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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 62

NORTHERN NATURAL GAS COMPANY,
APPELLANT,

vs.

STATE CORPORATION COMMISSION OF THE
STATE OF KANSAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

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[fol. 1] [File endorsement omitted]

IN THE

SUPREME COURT OF THE STATE OF KANSAS

No. 42,127

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Appellee.

APPEAL FROM THE DISTRICT COURT OF FINNEY COUNTY, KANSAS
HONORABLE ROLAND H. TATE, JUDGE

Abstract of Record of Appellant, Northern Natural Gas Company—Filed August 25, 1960

Lawrence I. Shaw, F. Vinson Roach, Patrick J. McCarthy, 2223 Dodge Street, Omaha, Nebraska,

Ray H. Calihan, Logan N. Green, Daniel R. Hopkins, Ray H. Calihan, Jr., 118 West Pine Street, Garden City, Kansas,

Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, Mark H. Adams, II, John S. Seeber, Floyd E. Jensen, 202 Board of Trade Bldg., Wichita, 2, Kansas,

Attorneys for Appellant, Northern Natural Gas Company.

* * * * * * *

[fol. 5] These proceedings relate to the regulation and proration of gas production in the Kansas Hugoton Gas Field initiated under "Basic Proration Order for the Hugoton Gas Field" promulgated by The State Corporation Commission of the State of Kansas March 21, 1944. * * *

* * * * * * *

[fol. 29] Under date of November 12, 1959, said Commission issued its Order initiating a hearing for the adoption of a rule to require purchasing companies to take gas ratably from all wells to which they are connected in the same common source of supply, which order was as follows:

[fol. 30]

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Docket No. 34,780-C
(C-1825)

Conservation Division

In the Matter of the General Rules and Regulations for the Conservation of Crude Oil and Natural Gas.

ORDER—November 12, 1959

Now on this 12th day of November, 1959, the above-entitled matter comes before the Commission for consideration on its own motion, and the Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) finds:

1. That G.S. 1949, 55-703, as amended, imposes the following duty on this Commission:

> "The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *"

2. Evidence presented to the Commission indicates that some companies have been and are producing certain wells at higher rates than other wells in the same common source of supply; that this disparity in rates of production has resulted in the accumulation of sizable underages by many wells while others are producing their current allowables; that such situation, if permitted to continue, would violate

correlative rights, and the statutory provision above set forth.

3. That in effectuating its stautory duty in the premises, an investigation should be instituted and a public [fol. 31] hearing held thereon for the purpose of considering the adoption of a Rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected.

4. That a public hearing should be held on said investigation at the Lassen Hotel, Wichita, Kansas, on Thursday, December 17, 1959.

It Is, Therefore, by the Commission Ordered: That an investigation be and it is hereby instituted herein for the purpose of considering the adoption of a Rule to require companies to take gas ratably from all wells to which they are connected in the same common source of supply.

It Is Further by the Commission Ordered: That a public hearing be held on said investigation at the Lassen Hotel, Wichita, Kansas, on Thursday, December 17, 1959, starting at 9:00 a.m.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders, and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

By the Commission It Is So Ordered.

Wiles, Chm.; Beatty, Com.; Byrd, Com.

Raymond B. Harvey, Secretary.

(Seal)

[fol. 32]

TRANSCRIPT OF HEARING BEFORE COMMISSION, DECEMBER 17, 1959, IN DOCKET NO. 34,780-C (C-1825)

APPEARANCES

Northern Natural Gas Company, Republic Natural Gas Company, Cities Service Oil Company, Colorado Interstate Gas Corporation, Northern Pump Company, W. L. Hartman, Southwest Kansas Royalty Owners Association, Cities Service Gas Company, Sinclair Oil and Gas Company, Panhandle Eastern Pipe Line Company, Skelly Oil Company, Western Natural Gas Company, Kansas Power and Light Company, Kansas-Colorado Utilities, Inc., Pan American Petroleum Corporation.

Commission appeared by its Counsel.

STATEMENT AND MOTION BY MR. J. ROBERT WILSON (GENERAL COUNSEL FOR THE STATE CORPORATION COMMISSION)

Chairman Wiles: Mr. Wilson, does the staff have a statement to make in reference to this docket?

Mr. Wilson: We do. This matter was set down on the Commission's own motion. Therefore, I feel it is the duty of the staff to make some sort of statement as to how this matter arose. The reason for this matter being set down was a docket which the Commission heard, Docket No. [fol. 33] 60,740-C, in the matter of Northern Natural Gas Company to show cause. We took a considerable amount of evidence in this matter, and, as a result, entered an order in this docket ordering Northern to take ratably from all the wells to which they were connected in the Hugoton Field.

Northern, in their petition for rehearing to the Commission, made the allegation that the Commission was discriminating against Northern for making requirements of Northern that weren't made of other gas companies. Well, it was the position of the Commission staff, and the Commission accepted our recommendation, that we didn't want anybody to feel that they were being discriminated against, and that what was good enough for Northern Natural was good enough for all of the other gas companies.

Since all of the background material for this proceeding is in this Docket No. 60,740-C, I would like to move that the evidence in Docket No. 60,740-C be incorporated in this docket. There may be a few individuals here or companies who did not have an opportunity to cross-examine with regard to the evidence that was introduced in this docket. However, many of the companies did take an active part in this proceeding and I am certain, from the extensive cross-examination, that almost any question that could have been asked on cross-examination of any of the witnesses in this proceeding was asked. Therefore, I feel that the Commission should relax its prior rulings in some cases that evidence from other dockets not be incorporated, and I ask [fol. 34] that the testimony and the exhibits in Docket No. 60,740-C be incorporated in this proceeding.

After discussion the testimony and exhibits in Docket No. 60,740-C were ordered incorporated in and made a part of this record.

* * * * * * *

[fol. 83]

CONTINUATION OF PROCEEDING BEFORE COMMISSION, DECEMBER 17, 1959, IN ITS DOCKET 34,780-C

Commissioner Beatty stated that the Commission's purpose in the proceeding "is to arrive at some kind of a rule and, in doing that, our primary duty is to determine what are our duties under the statute and what rule or regulation will best carry out those duties. It may be that some of the parties want to put on experts to give us the benefits of their knowledge of the situation or advise us of certain facts of which we should be apprised in making up these rules but, for the most part, it appears to be now that this [fol. 84] hearing would be principally a matter of law, a matter of policy which could be handled by statements of counsel, briefs, and perhaps some testimony by experts in those areas where you think the Commission needs guidance."

Mr. Stucky, Attorney for Southwest Kansas Royalty Owners' Association stated his observation of the proceedings:

"Now, it seems to me that you can look at this in various steps. The notice of this hearing has reference to ratable taking as to the wells to which a particular purchasing company is connected. It's sort of like pipe line proration. You are considering whether or not you should require each company to prorate its total gas supply equally among the wells to which it is connected."

Mr. Poe (Attorney for Colorado Interstate Gas Company): That is the ratable taking order, and that is what I am talking about. I don't see how any rule that we adopt now, after that hearing has been concluded on facts and laws that existed at the time of that hearing, could have any effect upon the factual situation in that case. It would be almost *ex post facto.*

Mr. Wilson: No, our order (October 7, 1959) governed Northern only as to its future actions, and this rule would have the effect only in the future, Mr. Poe. There is no question of *ex post facto.*

Mr. Poe: Your order to Northern was based upon a state of conditions as they existed certainly at the time you tried the case.

[fol. 85] Mr. Wilson: But we told Northern only what to do as to the future. We didn't tell them as to the past.

Thereupon the Commission directed its staff to prepare and submit a proposed ratable take rule to all parties of record by January 1, 1960, and that all parties of record who suggest changes in such proposal or have a suggested proposal of their own shall then transmit them to the Commission by January 15, 1960.

Thereupon the hearing was continued to January 21, 1960.

TRANSCRIPT OF HEARING IN COMMISSION DOCKET
DOCKET NUMBER 34,780-C—January 21, 1960

Appearances were the same as in the prior hearing in this Docket on December 17, 1959, with the following additional parties appearing by their respective attorneys:

Superior Oil Company,
Plateau Natural Gas Company,
Sunray Mid-Continent Oil Company,
J. M. Huber Corporation,
Atlantic Refining Company,
Hugoton Production Company,
Columbian Fuel Corporation,
Mobil Oil Company, Inc.

Testimony of LESTER WILKONSON (Witness for Commission).

Direct examination.

By J. Robert Wilson:

I am a consulting petroleum engineer residing at Wichita, Kansas. I am familiar with staff's proposals for new [fol. 86] ratable take numbered Rule 82-2-219. These proposals have been marked Exhibits numbered 1 and 2. I have also prepared some computations in this matter, which computation has been marked as Exhibit 3. The identified Exhibits 1 and 2 are as follows:

EXHIBIT 1

Proposal 1

82-2-219

In each common source of supply subject to proration by this Commission from which the allowed production is not being taken by any purchaser within the limits prescribed in the basic proration order for any such common source of supply, then in that event gas shall be taken by such purchaser or purchasers as follows:

1. Gas shall be taken in proportion to the allowable from all wells to which connected in the same common source of supply.

2. The proportion of gas to be run from each well shall be determined by dividing the total runs for a proration period by the total current allowable for the same period. The resulting factor shall be applied to the current allowable for each well to establish its proportionate share of the gas being taken.

3. No well may over produce its cumulative proportionate share allowable for more than four consecutive months. Any well which has over produced its cumulative proportionate share allowable four consecutive months shall be shut in at least one month or as much longer as [fol. 87] is necessary to bring its cumulative status into balance with cumulative proportionate share allowable.

4. In applying the provision of this rule, wells not capable of making their allowable shall not be considered.

5. Any purchaser subject to the provision of this rule shall each month provide the Conservation Division with a production schedule showing status of all wells to which connected related to runs, actual allowables and proportionate share allowables.

EXHIBIT 2

Proposal II

82-2-219

In each common source of supply subject to proration by this Commission, each purchaser shall take gas in proportion to the allowable from all the wells to which it is connected. In the event any wells connected to the same purchaser in the same common source of supply are produced at rates which are not in proportion to the allowables to the extent that the difference in their production status determined by dividing the net allowable by the basic allowable varies by more than one, then the well or wells from which the greater proportional takes have been

produced shall be shut in until the difference is reduced to the above tolerance; provided however, no well shall be shut in for difference in proportion of takes when the difference results from the inability of a well to produce proportionately with other wells connected to the purchaser. [fol. 88] I have been at a loss to determine when a rule of this type would become effective in a pool and how to make it work along the flexible limits of a Basic Proration Order. If wells are out of balance when such a new rule went into effect there should be a balance set up whereby you come back to that balance and then from that point on you would more or less produce ratably. I think this is one of the deficiencies in staff proposal number 1.

Exhibit number 2 is drawn to accomplish the same purpose as Exhibit number 1. It has the defect that it does not allow the purchasing company as much flexibility as proposal number 1. I am not in a position to say what flexibility is necessary.

Cross examination.

By Mr. Ralph R. Brock (Attorney for Northern Pump Company and W. L. Hartman):

Staff proposal Exhibit 1 is not intended to balance the production of wells in the same common source of supply regardless of which pipe line they are connected to. It merely proposes pipe line proration.

Cross examination.

By Mr. Lewis R. Poe (Attorney for Colorado Interstate Gas Company):

We endeavor in the preparation of staff proposals Exhibits 1 and 2 to write them so that they would not infringe upon anything which was in the Basic Proration Order already written. With respect to wells that are incapable of producing allowables fixed during the winter months, but are capable of overproducing the allowables fixed for summertime production, the proposals may be too restric-

tive. It could be that we would want a twelve month flex-
[fol. 89] ibility instead of a four month flexibility.

Q. You are not basing it then on just the evidence that has been introduced in this particular procedure?

A. Well, no. I think that can happen in any pool where you have more than one purchaser.

Commissioner Byrd: Mr. Wilkonson, isn't it more apt to happen in pools where you have a variation in the contracts for the purchase of gas? The number of purchasers doesn't necessarily affect the situation, does it, but it's where you have a purchaser that has one kind of a contract with one producer and another kind of a contract with other producers in the same common source of supply. Isn't that correct?

The Witness: Well, if the contract was the reason that caused him not to produce his wells ratably, then that would be the case. If he chose to for some reason just favor one group of wells over another, that would be the same thing.

Cross examination.

By Mr. Mark H. Adams (Attorney for Northern Natural Gas Company):

Staff proposal number 1, Exhibit number 1, relates to purchasers rather than to producers. Where the word "taken" is used in proposal number 1, such word was meant to be synonymous with the word "purchased". I believe there should be some clause added to proposal number 1 which would correct the status of over and underproduction as between wells so that the gas will be taken ratably; that we should determine each well's current cumulative status to start from.

Q. Your proposal, Mr. Wilkonson, does not take into account, in any way, does it, contractual arrangements [fol. 90] which exist in the Hugoton Field in particular or possibly in any other field, for the taking of gas disproportionately.

A. We did not consider contracts or anything of that nature when we tried to write this order.

Cross examination.

By Mr. C. C. Linley (Attorney for Panhandle Eastern Pipe Line Company):

Staff's proposal Exhibit 1 was intended not to go into effect at all unless a well or wells connected to a pipe line system would exceed the underproduced or overproduced limits of the applicable Basic Proration Order for the pool involved.

Staff proposal Exhibit number 2 is different in that it would constitute a restriction upon the flexibility provisions of the applicable Basic Proration Order. It would constitute a further restriction within a restriction or "an order within an order". It would be a further restriction on the flexibility of operations of a pipe line purchaser as to the individual wells connected to its system within the restrictons already placed upon its operations in the Basic Order. Purchasers would still be allowed to overproduce or underproduce the total group of wells connected to its pipe line to the same limits as allowed in the Basic Order.

Testimony of R. T. Widney (In behalf of Cities Service Oil Company).

Direct examination.

By Alfred Holl:

I am employed by Cities Service Oil Company as Superintendent of Gas Production. Where there is more than one pipe line purchaser of gas from a common source of supply, at times one pipe line will take more gas than [fol. 91] another, which does provide unratableness in purchases between pipe lines. When this occurs the individual wells should be kept ratably connected to one pipe line.

Cross examination.

By Mr. Adams:

Q. Mr. Widney, your company is a producer of gas in the Hugoton Gas Field in Kansas, is that correct?

A. That is correct.

Q. Now, it has a sales contract under which Northern Natural Gas Company is the purchaser of the gas that you produce in the Hugoton Field, is that correct?

A. That is correct.

Q. That is the contract that was referred to in the hearing before the Commission in Docket No 60,740-C in the hearing held July 24, 1959?

A. Subject to checking, yes, sir.

Q. Now, that contract, or any other gas sales contracts that you have with companies that transport and sell gas in interstate commerce, is filed with the Federal Power Commission, isn't that correct?

A. As I understand it, they are; yes, sir, in interstate commerce.

Q. Yes, and your company secured a certificate of public convenience and necessity from the Federal Power Commission giving authority to produce and sell gas under such contracts?

A. I presume they have.

Q. You say you presume. Is there anybody here with your company that knows whether or not that is a fact?

Mr. Holl: If the Commission please, he can answer it if he likes, but that appears to me to be somewhat immaterial to the call of this hearing and certainly not proper cross-examination of this witness.

[fol. 92]

Mr. Adams: Well, if the Commission please, the Commission permitted the transcript of testimony and exhibits in Docket No. 60,740-C before this Commission to be made a part of this record at the last hearing in this particular docket and this matter was gone into partially in the earlier hearing in Docket No. 60,740-C and my question merely supplements the testimony that related to the gas sales contract that was referred to in that docket, and I think it's proper cross-examination, if you want to call it that.

Mr. Holl: As I recall from that docket number, we were willing to stipulate that such a contract was in existence and, if Mr. Adams wants to make that a point, that it has been approved by the Federal Power Commission, I can't

answer that definitely either, but I assume it has. We are willing to stipulate to that.

Testimony of W. L. Arvenshire (Witness for Panhandle Eastern Pipe Line Company).

Direct examination.

By Mr. C. C. Linley:

I am a petroleum engineer with ten years experience as such. I am employed by Panhandle Eastern Pipe Line Company as staff engineer in its Production and Supply Division. It is apparent from the record that the sole reason for the proposal of the order here involved is for the Commission to bolster the Commission's position in the case against Northern Natural Gas Company, which arises from circumstances applying only to that company.
[fol. 93] I would like to strongly recommend that no such order be adopted.

Mr. Jones (Mr. Richard Jones, Attorney for Republic Natural Gas Company): If the Commission please, I would like to reaffirm the views which I expressed earlier in response to Commissioner Beatty's question. It is our position that no rule is necessary, that the Commission has adequate authority under the statute and the rules as they exist to accomplish the task of assuring equitable taking and ratable taking. If the Commission does conclude that its authority or its exercise of that authority is not sufficiently spelled out in the rules as they exist, we would like to have an opportunity to submit a form of general rule to supply such a deficiency, if the Commission finds that it does exist, and we would be glad to do it upon request. In other words, we wouldn't want a general rule to be adopted without an opportunity to submit a form of rule.

Chairman Wiles: All right. Is there anything further to come into this record? (No response.) This record will remain open until the first day of February. In the interim, if anybody has any proposals they would like to submit, they may do so. At that time, it will be closed.

If you have any briefs or any statements or any proposals, whatever you may wish to submit to the Commission, you may do so between now and the first day of February.

Thereafter on or about the 27th day of January, 1960, Republic Natural Gas Company through its attorney Richard Jones filed with the Commission its recommended [fol. 94] form of order, a true copy of which is attached hereto as Appendix 3.

Thereafter under date of February 3, 1960, said Commission entered its order based on said hearing which order, without formal parts is as follows:

ORDER—February 3, 1960

Now on this 3rd day of February, 1960, the above-entitled matter comes on for consideration and determination by the State Corporation Commission, hereinafter referred to as the Commission. The Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) having heard the evidence and examined the files and records, and thereby being fully advised in the premises, finds:

1. That on November 12, 1959, the Commission, upon its own motion, ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. That notice of the time and place of said investigation and hearing was published on December 5, 1959, in the Topeka Daily Capital, and that a copy of such notice was mailed to all interested parties. Pursuant to notice, a public hearing was held on December 17, 1959, at the Lassen Hotel, Wichita, Kansas. Appearances were as follows:

Lewis M. Poe and Stuart Carter, representing Colorado Interstate Gas Company;

Stuart R. Carter, representing Sinclair Oil and Gas Company;

[fol. 95] Alfred O. Holl and P. K. Smith, representing Cities Service Oil Company;

Ralph R. Brock, representing Northern Pump Company; and W. L. Hartman;
Richard Jones, representing Republic Natural Gas Company;
Milo M. Unruh, representing Kansas-Colorado Utilities, Inc.;
Norton Standaven and Charles Lindberg, representing Pan-American Petroleum Corporation;
O. R. Stites, representing Cities Service Gas Company;
Jeff A. Robertson and C. C. Linley, representing Panhandle Eastern Pipe Line Company;
A. E. Kramer and Dale Stucky, representing Southwest Kansas Royalty Owners Association;
George W. Selinger, representing Skelly Oil Company;
Mark H. Adams, Mark H. Adams, II, and Jack C. Osborne, representing Northern Natural Gas Company;
W. P. Wesley, representing Western Natural Gas Company;
J. L. Higday, representing Kansas Power and Light Company;
J. Robert Wilson and John Townsend, representing the Commission.

The hearing was adjourned for the purpose of receiving and disseminating proposals, until January 21, 1960, at which time the hearing reconvened. Appearances in addition to those entered at the hearing of December 17, 1959, were as follows:

[fol. 96] Stanford Smith, representing Cities Service Oil Company;
Homer Penn, representing Republic Natural Gas Company;
Richard Jones, representing Superior Oil Company, a California corporation;
Milo M. Unruh, representing Plateau Natural Gas Company;
Richard Jones and William R. Loar, representing Sunray Mid-Continent Oil Company;

Ferd Evans, representing J. M. Huber Corporation;
Donald Mitchell, representing Atlantic Refining Company;
Daniel R. Hopkins, representing Hugoton Production Company;
W. P. Wesley, representing Columbian Fuel Corporation; and
Charles Lindberg, representing Mobil Oil Company, a division of Socony-Mobil Oil Company, Inc.

2. That G.S. 1949, 55,703, as amended, imposes the following duty on this Commission:

> "The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *"

3. That for the purpose of facilitating such regulation, and thereby accomplishing the duty contemplated by the statute, it is necessary that the Commission promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which they are connected.

[fol. 97] 4. That the Commission's staff and other parties have submitted proposals at the hearings, and subsequent thereto, which have been considered by the Commission.

5. That Exhibit "A", designated as Rule 82-2-219, meets the mandate of the statute and will enable the Commission to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected; and that the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas should be amended by adopting the proposed Rule as contained in Exhibit "A", and that said proposal should be designated Rule 82-2-219.

6. That Rule 82-2-219 is of statewide application and should therefore be filed with the Revisor of Statutes on

February 8, 1960. This order and Rules 82-2-219, which is attached hereto as Exhibit "A" and made a part hereof, should be served upon all parties affected by this rule by first class United States mail. Further notice should be given by publishing this order including Rule 82-2-219 in the official state paper, on February 8, 1960, and this rule shall become effective on February 8, 1960.

It Is, Therefore, by the Commission Ordered: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960.

[fol. 98] And It Is Further Ordered: That this order and said rule, duly certified, be served upon all parties to be affected by first class United States mail and that further notice be given by publishing this order including Rule 82-2-219 in the Official State Paper, on February 8, 1960.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders, and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

By the Commission It Is So Ordered.

Wiles, Chm.; Beatty, Com.; Byrd, Com.

EXHIBIT "A" TO ORDER

Rule 82-2-219

Ratable Production of Gas from Common Source of Supply

In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results

from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959, Supp. 55-703; Effective February 8, 1960).

[fol. 99]

PETITION FOR REHEARING OF NORTHERN NATURAL GAS COMPANY—Filed February 9, 1960

* * * * * * *

Comes Now Northern Natural Gas Company, a corporation, petitioner, and hereby petitions this Commission for an order setting aside and granting a rehearing in the above captioned proceeding with respect to Commission's "Order" and "Rule 82-2-219" dated February 3, 1960, and effective February 8, 1960, shows:

1. That Petitioner is a corporation, organized under the laws of the State of Delaware, with its principal office at Omaha, Nebraska, and duly licensed to transact business in the State of Kansas; that it is now and has been during all times material herein engaged generally in the business of purchasing natural gas for transportation by means of pipe line system and facilities extending from Texas into and through Oklahoma and Kansas and into Nebraska, Iowa, Minnesota and South Dakota; that in such operation, and as an integral part thereof, petitioner has, among other things, entered into about 125 contracts with certain producers in Finney County, Kansas, and other Kansas counties within the confines of the Kansas Hugoton Gas Feld, which contracts are presently subsist-[fol. 100] ing and have subsisted during all times material herein, for the purchase of natural gas produced in and from said field, and under which contracts (a) the recoverable gas under the lease acreage covered by said contracts was and is dedicated to be sold to Northern Natural Gas Company, and (b) express provisions are included in all such contracts which prescribe a certain method of apportionment amongst all such producers of Northern's requirements for gas from the said field; that petitioner is a natural gas company as defined in the Natural Gas Act, as amended (15 U.S.C.A. 717, *et seq.*),

and is engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for domestic, commercial, industrial and other uses. That such sales of natural gas are sales in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial and other uses and as such are subject to the provisions of said Natural Gas Act and to the jurisdiction of the Federal Power Commission thereunder. Northern does not own, in whole or in part, a well capable of producing oil or gas or both in commercial quantities, and consequently it is not a producer in Kansas, as that term is defined in General Rules and Regulations for the conservation of crude oil and natural gas, issued by the State Corporation Commission of the State of Kansas. Its wholly owned subsidiary, Northern Natural Gas Producing Company, is such a producer. Petitioner is an interested party in captioned proceedings, its substantial gas reserves in the Kansas Hugoton Gas Field and con- [fol. 101] tract rights with respect thereto being affected by the herein complained of order, such gas reserves dedicated for sale to petitioner being necessary and essential to petitioner's pipe line operation for the interstate transmission of gas for sale in interstate commerce for resale.

2. That said "Order" and "Rule 82-2-219" are unlawful, illegal, unconstitutional, beyond the jurisdiction of the Commission and void, in that:

(a) The findings therein are contrary to the evidence, are not supported by any competent evidence and are wholly unauthorized, unfounded and unwarranted, either under the evidence or under the Statutes of Kansas, relating to "production and conservation of natural gas" Section 55-701 *et seq.*, G.S. of Kansas, 1949, as amended.

(b) They are contrary to and in direct conflict with said Commission's Basic Proration Order, as amended, for the Kansas Hugoton Gas Field promulgated and adopted by said Commission March 21, 1944, in Docket C-164 initially effective March 31, 1944.

(c) They are arbitrary, capricious and discriminatory as to petitioner, are an unreasonable abuse of administrative authority on the part of the Commission, and are contrary to and beyond the scope of powers granted the Commission by any statute.

(d) They purport to amend said Commission's Basic Proration Order for the Hugoton Gas Field in a proceeding not noticed to any party as being a proceeding for the amendment of said Basic Proration Order, all in violation of the due process clause of the Constitution of the United States.

[fol. 102] (e) They are so vague and indefinite as to what they purport to establish as "ratable taking" or "ratable production" as to be impossible of reasonable interpretation or proper administration; it is impossible from reading the "Order" and "Rule" to determine if they are directed toward an objective of "ratable purchasing" or toward "ratable production." They are the making of a rule as the occasion arises, which certainly is not a guide for anyone; they amount to rule by man rather than rule by law and are lacking in due process of law.

(f) They purport to strike down and amend the express provisions in all of petitioner's gas purchase contracts in the Kansas Hugoton Gas Field by which all producers selling gas to petitioner have agreed to the apportionment of Northern's gas requirements amongst them, thereby (a) casting an unlawful burden upon, impairing and impeding the interstate operations of petitioner in the purchase, transportation and sale in interstate commerce of natural gas for resale taken by petitioner from said Kansas Hugoton Gas Field in violation of the commerce clause of the United States, (b) in impairment of and contrary to the exclusive jurisdiction of the Federal Power Commission under the subsisting provisions of the Natural Gas Act, 15 U.S.C.A. 717, et seq., and (c) in impairment of the obligations of such gas purchase contracts in viola-

tion of Section 10 of Article I of the Constitution of the United States.

(g) They destroy and take petitioner's contract and property rights without compensation, and abridge petitioner's privileges and immunities in contra-
[fol. 103] vention and in violation of Sec. 17, Art. 2 of the Constitution of the State of Kansas, and the Fourteenth Amendment to the Constitution of the United States.

(h) Unless rehearing is granted herein as prayed for, petitioner shall assume that it is the meaning and intent of Commission's "Order" and "Rule 82-2-219" that the provisions of all of petitioner's gas purchase contracts in the Kansas Hugoton Gas Field which provide for a method of purchases and receipts of gas which in operative effect is contrary to or vary from such "Order" and "Rule 82-2-219", are invalid and void as against public policy, including any such provisions which require purchases and receipts of gas at rates and in amounts greater than required by such "Order" and "Rule 82-2-219", as well as any such provisions which permit purchases and receipts of gas at rates and in amounts less than required by such "Order" and "Rule 82-2-219".

Wherefore, and by reason of the foregoing, petitioner prays that its Petition for Rehearing be granted and that upon such rehearing said "Order" and "Rule 82-2-219" be set aside and appropriate order entered in accordance with the evidence presented and the applicable law.

* * * * * * *

[fol. 104]

ORDER DENYING PETITION FOR REHEARING—
February 18, 1960

Now on this 18th day of February, 1960, the above-entitled matter comes before the Commission for further consideration on the petition for rehearing filed herein February

9, 1960, by Northern Natural Gas Company with respect to the Commission order issued herein dated February 3, 1960. The Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) having re-examined its files and records herein, and being advised in the premises, finds:

1. That the Commission order above-referred to issued herein on February 3, 1960, was a valid exercise of its authority under G.S. 1949, Chapter 55, Article 7, as amended.

2. That the petition for rehearing filed herein presents no new matter for Commission consideration; that said petition for rehearing is without merit and should be denied.

It Is, Therefore, by the Commission Ordered: That the petition for rehearing filed herein by Northern Natural Gas Company be and it is hereby denied.

By the Commission It Is So Ordered.

Wiles, Chm.; Beatty, Com.; Byrd, Com.

[fol. 105]

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS

PETITION FOR JUDICIAL REVIEW—Filed February 19, 1960

Case No. 10788

Comes Now the Petitioner, Northern Natural Gas Company, and for its petition for judicial review herein against the action of the above named Respondent, alleges and shows to the Court as follows:

1. That Petitioner is a corporation, organized under the laws of the State of Delaware, with its principal office at Omaha, Nebraska, and duly licensed to transact business in the State of Kansas; that it is now and has been during all times material herein engaged generally in the business of purchasing natural gas for transportation by means of pipe line system and facilities extending from Texas into and through Oklahoma and Kansas and into Nebraska, Iowa, Minnesota and South Dakota; that in such operation, and as an integral part thereof, petitioner has, among other

things, entered into about 125 contracts with certain producers in Finney County, Kansas, and other Kansas counties within the confines of the Kansas Hugoton Gas Field, which contracts are presently subsisting and have subsisted during all times material herein, for the purchase of natural gas produced in and from said field, and under which contracts (a) the recoverable gas under the lease acreage covered by said contracts was and is dedicated to be sold to Northern Natural Gas Company, and (b) express provisions are included in all such contracts which prescribe a certain method of apportionment amongst all such producers of Northern's requirements for gas from the said field; that petitioner is a natural gas company as [fol. 106] defined in the Natural Gas Act, as amended (15 U.S.C.A. 717, *et seq.*) and is engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for domestic, commercial, industrial and other uses. That such sales of natural gas are sales in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial and other uses and as such are subject to the provisions of said Natural Gas Act and to the jurisdiction of the Federal Power Commission thereunder. Northern does not own, in whole or in part, a well capable of producing oil or gas or both in commercial quantities, and consequently it is not a producer in Kansas, as that term is defined in General Rules and Regulations for the conservation of crude oil and natural gas, issued by the State Corporation Commission of the State of Kansas. Its wholly owned subsidiary, Northern Natural Gas Producing Company, is such a producer. Petitioner is an interested party in captioned proceedings, its substantial gas reserves in the Kansas Hugoton Gas Field and contract rights with respect thereto being affected by the herein complained of order, such gas reserves dedicated for sale to petitioner being necessary and essential to petitioner's pipe line operation for the interstate transmission of gas for sale in interstate commerce for resale.

2. That Respondent, the State Corporation Commission of the State of Kansas, is an administrative body,

created by legislative enactment, with its principal place of business and post office address at State Office Building, Topeka, Kansas, but the Conservation Division thereof [fol. 107] having its place of business and address at 500 Insurance Building, Wichita, Kansas; that Harry G. Wiles is Chairman of said Commission and Marion Beatty and Richard C. Byrd are members of said Commission.

3. That this is an action under G.S. 1949, 55-707, for a judicial review of proceedings before the State Corporation Commission of the State of Kansas in its Docket No. 34,780-C (C-1825) wherein it issued its "Order" dated February 3, and effective February 8, 1960, and its "Rule 82-2-219". That a full and complete transscript of the proceedings had in said docket, together with all exhibits therein introduced and attached thereto, is being filed in this court and are made a part hereof to the same extent as though set out verbatim. That a copy of said "Order" dated February 3, 1960, and effective February 8, 1960, and of said "Rule 82-2-219" is marked Exhibit "A", attached hereto and made a part hereof. That upon issuance of said "Order" dated February 3, 1960, and effective February 8, 1960, and of said "Rule 82-2-219", petitioner timely filed with Respondent a Petition for Rehearing, a true copy of which, without proof of service, is marked Exhibit "B" attached hereto and made a part hereof. That on February 18, 1960, said Petition for Rehearing was denied by Commission Order, a true copy of which is attached hereto as Exhibit "C" and made a part hereof.

4. That said "Order" dated February 3, 1960, and effective February 8, 1960, and said "Rule 82-2-219" promulgated thereby are unlawful, illegal, unconstitutional, beyond the jurisdiction of the Commission and void for each, [fol. 108] every and all of the reasons set forth in Petitioner's Petition for Rehearing, Exhibit "B" attached hereto.

5. That such "Order" and "Rule 82-2-219" promulgated thereby are so vague, indefinite and uncertain as to leave unanswered necessary questions pertaining to its applica-

bility and effect upon provisions in Petitioner's gas purchase contracts in the Kansas Hugoton Gas Field which might provide for a method of purchases and receipts of gas at rates and in amounts which, in operative effect, may be contrary to or vary from "ratable taking" as determined by the Commission, including any such provisions which purport to require purchases and receipt of gas at rates and in amounts greater than required by such "ratable taking" as well as any such provisions which purport to permit purchases and receipt of gas at rates and in amounts less than required by such "ratable taking".

6. That for all the reasons hereinabove stated and alleged, Petitioner respectfully asks said Court at this time to grant a stay of execution of the "Order" dated February 3, 1960, and effective February 8, 1960, and "Rule 82-2-219" promulgated thereby.

Wherefore, Petitioner prays:

(a) That this Court grant instanter a stay of execution of enforcement of the "Order" dated February 3, 1960, and effective February 8, 1960, and "Rule 82-2-219" promulgated thereby;

(b) That this Court enter judgment herein setting aside said "Order" dated February 3, 1960, and effective [fol. 109] February 8, 1960, and "Rule 82-2-219" for the reasons that they are unreasonable, arbitrary, unlawful, beyond the jurisdiction of the Commission and void; and

(c) That Petitioner be granted all other relief to which Petitioner may be entitled hereunder.

The exhibits attached to and made a part of such Judicial Review Petition are heretofore shown in the Abstract of Record as follows:

Exhibit A—Commission's Order of February 3, 1960, at Ab. pp. 14-17.

Exhibit B—Copy of Northern Natural Gas Company's Petition for Rehearing at Ab. pp. 18-21.

Exhibit C—Copy of Commission's Order denying said Petition for Rehearing at Ab. pp. 21-22.

• • • • • • • •

JOURNAL ENTRY OF JUDGMENT—April 8, 1960

Case No. 10788

Now on this 8th day of April, 1960, there comes on for consideration and determination by the Court the petition of Northern Natural Gas Company for judicial review of the State Corporation Commission's Rule 82-2-219, entitled [fol. 110] "Ratable Production of Gas From a Common Source of Supply", promulgated on February 8th, 1960, and the February 8th, 1960 Order of said State Corporation Commission promulgating said rule. The petitioner appears by its attorneys of record, and the respondent, State Corporation Commission, appears by its attorneys of record.

Whereupon, the Court, having examined the files and records herein, and having he d the arguments of counsel on March 15, 1960, finds that the said rule and order of the State Corporation Commission are lawful, valid and reasonable, and should be affirmed.

It Is, Therefore, by the Court Considered, Adjudged and Ordered: That the State Corporation Commission's Rule 82-2-219, entitled "Ratable Production of Gas from a Common Source of Supply", promulgated on February 8, 1960, and the February 8, 1960 Order of said State Corporation Commission promulgating said rule are affirmed.

By the Court, Roland H. Tate, Judge.

MOTION FOR NEW TRIAL—Filed April 11, 1960

Comes now Northern Natural Gas Company and moves the court for an order vacating the judgment previously [fol. 111] entered herein and granting a new trial in the above entitled cause for the following reasons:

1. Because of abuse of discretion of the court.

2. Because of accident and surprise which ordinary prudence could not have guarded against.

3. Because this petitioner was not afforded a reasonable opportunity to present its evidence and be heard on the merits of the case.

4. Because of erroneous rulings of the court.

5. Because the judgment and decision is in whole or in part contrary to the evidence.

6. Because of newly discovered evidence which petitioner could not with reasonable diligence have discovered and produced at the trial.

7. Because the judgment and decision of the court was procured by the corruption of the party obtaining it.

By all of which the rights of the petitioner herein, Northern Natural Gas Company, were substantially affected.

ORDER OVERRULING MOTION FOR NEW TRIAL—
April 27, 1960

Now on this 27th day of April, 1960, the above entitled matter comes on for hearing on the motion of the peti- [fol. 112] tioner Northern Natural Gas Company for a new trial herein. The parties appear by their attorneys of record.

Thereupon the court considers the pleadings filed herein, hears arguments of counsel and being otherwise fully advised in the premises finds that petitioner's motion for new trial herein should be overruled.

It Is, Therefore, by the Court Considered, Ordered, Adjudged and Decreed that the motion for new trial filed herein by Petitioner Northern Natural Gas Company be and the same is hereby overruled.

Roland H. Tate, Judge.

NOTICE OF APPEAL—Filed May 6, 1960

To: The State Corporation Commission of the State of Kansas, and J. Robert Wilson, General Counsel, and S. F. Fleeker, Assistant General Counsel, its attorneys of record.

You and each of you please take notice that the above named petitioner, Northern Natural Gas Company, has appealed and does hereby appeal to the Supreme Court of the State of Kansas, from the judgment and decision, and [fol. 113] every part thereof, of the District Court of Finney County, Kansas, made herein and entered on April 8, 1960, and does further appeal to said Supreme Court from the order of said District Court, denying and overruling said petitioner's motion for new trial, made herein and entered on April 27, 1960, in said above entitled action.

SPECIFICATIONS OF ERROR

I.

The trial Court erred in its judgment affirming the Order of the State Corporation Commission dated February 3, 1960, and the Rule promulgated thereby, in that:

(a) Said Order and the Rule promulgated thereby and each of the findings of fact therein purporting to be in support thereof are unauthorized by and contrary to the valid subsisting provisions of the Statutes (particularly 55-703, G.S. 1949, as amended) dealing with the production and conservation of natural gas, the Basic Proration Order for the Kansas Hugoton Gas Field and the statewide gas conservation Rules and Regulations of the Commission.

(b) Such Order and the Rule promulgated thereby are not supported by substantial, competent relevant and material evidence, but are contrary thereto.

(c) That said Order and the Rule promulgated thereby are arbitrary, unreasonable and discriminatory, have no relationship to proration or conservation of gas, burden interstate commerce, and take appellant's

[fol. 114] property and contract rights in property, all in violation of the Federal Constitution, namely the Commerce Clause (Clause Three, Section Eight of Article I) the Contract Clause (Clause One, Section Ten of Article I) and the provisions of the Fourteenth Amendment thereto and the Kansas Bill of Rights, Sections 1, 2 and 18 and Section 17, Article II of the Kansas Constitution.

(d) Said Order and the Rule promulgated thereby, together with the Statutes upon which the same are based as construed to authorize such Order and Rule, under the evidence as applied to appellant, violate the provisions of the Natural Gas Act (15 U.S.C.A. 717 *et seq.*) and invade the jurisdiction of the Federal Power Commission thereunder.

[fol. 169]

Appendix III.

Republic Natural Gas Company's Letter to Commission—January 27, 1960

The Honorable Harry C. Wiles
Chairman
Kansas State Corporation Commission
State House
Topeka, Kansas

Re: Docket No. 34,780-C (C-1825)
In the Matter of the General Rules and Regulations for the Conservation of Crude Oil and Natural Gas.

Dear Sir:

At the close of the hearing in the subject docket, the Commission announced that the docket would remain open until February 1, 1960, in order to permit those who might desire to do so to submit suggestions for a "ratable take" rule to be adopted by this Commission.

This letter is written on behalf of our client, Republic Natural Gas Company. Republic Natural Gas Company adheres to its expressed vi w that the General Statutes of Kansas and the rules adopted by this Commission for the purpose of carrying out the directions of the statutes are sufficient as they presently exist and do not require the adoption of any rule pertaining to the ratable taking of natural gas.

However, in the event the Commission feels that some further statement or expression is necessary, we suggest [fol. 170] that a rule in the following form would be appropriate:

> Each purchaser of gas connected to wells in a common source of supply subject to proration by the Commission is required to take ratably in accordance with the allowable factors established by the Commission and is required to maintain all of the prorated wells connected to its facilities in the same common source of supply in substantially the same percentage status as to overproduction and underproduction.

We believe that a rule in the above form could be adopted without creating the obvious problems which would result from any more stringent or specific rule.

Yours very truly,

Hershberger, Patterson, Jones & Thompson

/s/ Richard Jones

RJ:rj

cc. All counsel of record.

[fol. 171] Acknowledgment of Service of Appellant's Abstract of Record and Waiver of Proof Thereof (omitted in printing).

[fol. 172] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,127

NORTHERN NATURAL GAS COMPANY, a Corporation, Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Appellee.

Appeal from the District Court of Finney County, Kansas

Honorable Ronald H. Tate, Judge

COUNTER ABSTRACT OF THE APPELLEE—Filed September 26, 1960

State Corporation Commission of the State of Kansas, J. Robert Wilson, General Counsel, S. F. Fleeker, Assistant General Counsel.

[fol. 173] The Appellee, for its counter abstract to the abstract filed by the Appellant herein, respectfully calls the Court's attention to the following additional testimony and evidence:

Hearing Before the State Corporation Commission on December 17, 1959, in the Commission's Docket No. 34,780-C (C-1825)

Chairman Wiles: Shall we come to order, please? Gentlemen, the Commission has directed the staff to submit a proposal to all parties of record by January 1, 1960. All parties of record who have suggested changes in the staff's proposal or a suggested proposal of their own shall then have them in the Commission's hands by January 15, 1960. Any suggested changes or substitute proposals are to be [fol. 174] served on all parties of record by the proposing party by January 15, 1960. In other words, if you have proposals to send to the Commission, also serve them on

all other parties of record at the same time. The docket will then be continued to January 21, 1960, for further hearing.

Hearing Before the State Corporation Commission on July 24, 1959, in the Commission's Docket No. 60,740-C (C-7216)

TESTIMONY OF REX D. FOWLER

Cross examination.

By Mr. Richard Jones, Attorney for Republic Natural Gas Company:

"Q. . . . Is it physically possible to have produced the allowable as fixed by the Commission?

"A. From the Republic 'A' wells?

"Q. No, from all of your connections in the Kansas Hugoton Field?

"A. All of the wells connected to our system in the Kansas Hugoton Field with possibly a minor exception or two are physically capable of producing the allowables that have been assigned, yes,"

Northern Natural Gas Company's requirements for gas from the Kansas Hugoton Field dropped sharply sometime in 1958. However, Northern Natural had not lost any markets at that time. Our markets have increased rather than decreased and that did not represent a sharp drop in our over-all demand for gas in the system. Our demand for gas in the Omaha District has also substantially increased in the past few years.

TESTIMONY OF R. T. WIDNEY

Direct examination.

By Mr. Alfred Holl, Attorney for City Service Oil Company:

Exhibit No. 10 shows the cumulative net allowable assigned to wells in the field. In January of 1959, Cities [fol. 175] Service Oil Company's wells had a January Current Allowable of 2,084,874 Mcf. They had an underage of 11,411,727 Mcf. 123,711 Mcf of underages for Cities Service Oil Company's wells were cancelled in January,

1959, by reason of being underproduced in excess of six times the January current allowable. The Republic Natural Gas Company ("A" Group) has a January current allowable of 2,674,390 Mcf, and an overage of 114,858 Mcf. They were overproduced 4.29 percent in that particular month. Northern Natural Gas Company's other connections had a January current allowable of 9,309,441 Mcf, with a total underage of 48,604,070 Mcf. The net status of that group of wells was 522.09 percent underproduced. They had 409,393 Mcf cancelled. Northern Natural Gas Company had a total January current allowable of 14,068,705 Mcf, and underage of 59,900,939; ratable net status per January current allowable, 425.77 percent. In comparing that we see that Northern Natural Gas Company, excluding Cities Service Oil Company and Republic "A" connections, had 522.09 (percent underproduction); Republic Natural Gas Company (Group "A"), -4.29; and with the Cities Service Oil Company's connections, 547.36 percent. To have everything ratable here, each one of these figures should be around 425.77 percent underproduced.

Although we have not included on this schedule the May ratability figures, for Cities Service Oil Company it is 595.28 percent. For the Republic Natural Gas Company ("A" Group) it is 8.61 percent. That was just a little under a month. Northern Natural Gas Company group, excluding Cities Service Oil Company and Republic "A" connections 575.07; and the total for the Northern Natural Gas Company would have been 471.89 percent.

Current production to me would mean in the neighborhood of two or three months. I disagree with Mr. Fowler's testimony that four or five years might be current.

[fol. 176] I have expressed an opinion that there is drainage occurring. Our studies indicate that if the wells are produced with the same percent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected. There are two ways of accomplishing this currently in the Hugoton Field. One is to raise the total (of) Northern Natural's takes up until they are ratable with the Republic "A" group, and second would be to lower Republic "A" by curtailing their production, so they will become ratable with the balance of the field.

If this is not done, further injury will be incurred by the latter part of 1961. Currently the correlative rights are being damaged in a great amount. The underages are being cancelled each month out there, which will not give the wells, unless they are reinstated, a chance to make up their allowable. They should be allowed to become ratable. If this situation continues over the next two and a half years, it will result in an intensification of damage to correlative rights.

TESTIMONY OF LESTER WILKONSON

Direct examination.

By Mr. Ferd Evans, Attorney for Northern Pump Company:

These cancellations (of allowables) result from Northern's failure to take the gas it is permitted to take.

Hearing Before the State Corporation Commission on January 21, 1960, in the Commission's Docket No. 34,780-C (C-1825)

Chairman Wiles: Gentlemen, shall we come to order? You will remember in the hearing last month the Commission's staff was directed to submit its proposals with reference to this matter to all interested parties. Any interested parties then had a given time to submit any changes which [fol. 177] they think should be made or any proposals of their own. The staff has submitted two different proposals. I am going to ask Mr. Wilson, our General Counsel, to proceed at this time.

TESTIMONY OF LESTER WILKONSON

Direct examination.

By Mr. J. Robert Wilson, Commission's General Counsel:

"Q. Will you state your name and address please?
"A. Lester Wilkonson, Wichita, Kansas.
"Q. What is your occupation?
"A. Consulting Petroleum Engineer."

Mr. Wilson: Does anyone here question Mr. Wilkonson's qualifications to testify in this matter?

(No response.)

Chairman Wiles: The qualifications will be admitted.

I believe that the purpose of the rule was to require that gas be taken ratably between the wells to which a purchaser was connected. This we have tried to state. We needed a starting place for people interested in the takes from the various gas pools to finally arrive at a state-wide rule. We didn't feel, in writing it, that we were doing a final job. There are many considerations which I think ultimately will have to be gone into in a rule of this type. Probably the greatest virtue of the order itself is the fact that we were able to start some place and give others a starting place for a final rule of this nature.

In writing proposal No. 1, our purpose was to get something out which would be a starting and get other people's views, and we might finally arrive at an order which would be a good one. The staff would like to hear testimony from various parties as to what flexibility is necessary. The staff has reached no definite position and their thinking is still very fluid on this matter.

[fol. 178] It is my opinion, as one who is familiar with operations in the Hugoton Field, that such an order or rule as suggested here is necessary at this time in the Hugoton Field. My opinion is based on the fact that wells connected to the same pipeline are widely out of balance with one another.

Certificate of Counsel to Record (omitted in printing).

[fol. 179] Acknowledgment of Service of Counter Abstract of the Appellee (omitted in printing).

[fol. 180]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,127

NORTHERN NATURAL GAS COMPANY, Appellant,

v.

STATE CORPORATION COMMISSION, Appellee.

Syllabus by the Court

GAS—*Order of Corporation Commission—Requiring Ratable Taking by All Purchasing Companies.* Pursuant to the provisions of G. S. 1949, 55-703, as amended, the State Corporation Commission has power to issue an order promulgating a rule to regulate the production of natural gas in such a manner as to require all gas purchasing companies to take natural gas ratably from all wells within the same common source of supply to which each is connected.

Appeal from Finney district court; Roland H. Tate, judge. Opinion filed June 10, 1961. Affirmed.

Mark H. Adams, II, of Wichita, argued the cause, and *Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, John S. Seeber* and *Floyd E. Jensen*, all of Wichita, and *Laurence I. Shaw, F. Vinson Roach* and *Patrick J. McCarthy*, all of Omaha, Nebraska, and *Ray H. Calihan, Logan N. Green, Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, all of Garden City, were with him on the briefs for the appellant.

Charles C. McCarter, General Counsel, argued the cause, and *S. F. Fleeker*, Assistant General Counsel, was with him on the briefs for the appellee.

OPINION—Filed June 10, 1961

The opinion of the court was delivered by

SCHROEDER, J.: This is a judicial review action to determine the validity of a State Corporation Commission order

and rule directed to gas purchasers, rather than gas producers, requiring them to purchase ratably from all wells within the common source of supply to which each purchaser is connected.

The petition for judicial review was filed on February 19, 1960, by Northern Natural Gas Company (hereafter referred to as Northern or appellant) in the district court of Finney County, Kansas. Thereafter, on the 8th day of April, 1960, the district court having heard argument of counsel entered its judgment confirming the Commission's order of February 3, 1960, and the Commission's promulgation of Rule 82-2-219 thereby. The lower court found the rule and order of the State Corporation Commission to be lawful, valid and reasonable.

After the trial court overruled Northern's motion for a new trial, appeal was duly perfected to this court.

In a companion case, *Northern Natural Gas Co.* v. *State* [fol. 181] *Corporation Commission*, 188 Kan. ——, —— P. 2d ——, No. 42,128, decided this date, Northern was directed by the State Corporation Commission to show cause why it should not take ratably from the wells to which it was connected in the Hugoton Field in Kansas. As a result of proceedings therein Northern was directed by an order of the Commission "to take gas ratably from its connections in the Kansas Hugoton Gas Field." As a part of such order the Commission retained jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders and promulgating and implementing such further rules and regulations as from time to time it deemed proper.

In Northern's petition for rehearing before the Commission, filed November 6, 1959, Northern contended, among other things, the order directed against it was unlawful in that:

> "(d) It purports to amend said Commission's Basic Proration Order for the Hugoton Gas Field insofar only as it affects one (Northern Natural Gas Company) of the seven principal purchasers of gas therein and in a proceeding not noticed to any party as being a proceeding for the amendment of said Basic Proration

Order all in violation of the due process clause of the Constitution of the United States."

Northern's petition for rehearing in the "show cause" case was denied and judicial review proceedings concerning the Commission's order dated October 7, 1959, were filed in the district court of Finney County, Kansas, now on appeal in the Supreme Court as Case No. 42,128, heretofore noted as the companion case.

The Commission, in apparent recognition of Northern's objection heretofore quoted, sought to bolster its position in the case against Northern, which arose from circumstances applying only to that company, and on November 12, 1959, on its own motion ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. In issuing such order the Commission found:

"1. That G. S. 1949, 55-703, as amended, imposes the following duty on this Commission:

"'The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. . . .'

"2. Evidence presented to the Commission indicates that some companies have been and are producing certain wells at higher rates than other wells in the same common source of supply; that this disparity in rates [fol. 182] of production has resulted in the accumulation of sizeable underages by many wells while others are producing their current allowables; that such situation, if permitted to continue, would violate correlative rights, and the statutory provisions above set forth.

"3. That in effectuating its statutory duty in the premises, an investigation should be instituted and a public hearing held thereon for the purpose of considering the adoption of a Rule to require that com-

panies take gas ratably from all wells in the same common source of supply to which they are connected."

Pursuant to such findings the Commission ordered:

"... That an investigation be and it is hereby instituted herein for the purpose of considering the adoption of a Rule to require companies to take gas ratably from all wells to which they are connected in the same common source of supply."

Notice was duly published on December 5, 1959, in the Topeka Daily Capital and a copy of such notice was mailed to all interested parties. Pursuant thereto a hearing was conducted in which the interested parties entered an appearance to present evidence and arguments on the matter.

The Commission, recognizing that it was prompted to conduct the instant proceedings by its docket in the matter of Northern to show cause (Docket No. 60,740-C), in which considerable evidence was taken, ordered the testimony and exhibits in Docket No. 60,740-C incorporated and made a part of the record. Therefore, the facts upon which the rule was promulgated in the instant case are in all material respects identical and present the same issues as the companion "show cause" case.

As a result of the hearing the Commission found pursuant to its duty under G. S. 1949, 55-703, as amended, that it was necessary to promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which each is connected, and by its order dated February 3, 1960, adopted Rule 82-2-219, which reads:

"Ratable Production of Gas from Common Source of Supply.

"In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however,

this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G. S. 1959, Supp. 55-703; Effective February 8, 1960)."

[fol. 183] In promulgating such rule the Commission found it met the mandate of the statute and enabled the Commission "to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected."

The Commission's general rules and regulations for the conservation of crude oil and natural gas were amended by adding Rule 82-2-219, and the Commission directed that its order and rule be filed with the Revisor of Statutes on February 8, 1960, at which date it was to be published and become official.

The contentions of the appellant are presented in its brief by what it denominates "Questions Involved." They are as follows:

"I.

"Said order and the rule promulgated thereby, approved by the trial court, and each of the findings of fact therein purporting to be in support thereof are not supported by substantial, competent, relevant evidence, and are unauthorized by and contrary to the Kansas Statutes dealing with the production and conservation of natural gas, the basic proration order for the Kansas Hugoton Gas Field and Commission's statewide gas conservation rules and regulations.

"II.

"Said order and the rule promulgated thereby as approved by the trial court are arbitrary, unreasonable and discriminatory, have no relation to proration or conservation of gas, burden interstate commerce and take appellant's property and contract rights all in violation of the Commerce Clause, the Contract Clause

and the Fourteenth Amendment to the Federal Constitution, and the Kansas Bill of Rights, Sections One, Two and Eighteen, and Section Seventeen, Article Two of the Kansas Constitution.

"III.

"Said order and the rule promulgated thereby as approved by the Court under the evidence as applied to appellant violates the provisions of the Natural Gas Act (15 USCA, 717 et seq) and invades the jurisdiction of the Federal Power Commission thereunder."

The foregoing contentions are identical with those advanced by Northern in the companion "show cause" case, No. 42,128, where they have been considered and answered by the court, upholding the power of the Kansas Corporation Commission to regulate the production of natural gas in such a manner as to require Northern to take gas ratably from all gas wells in the Kansas Hugoton Gas Field to which its lines were connected.

It follows that if the Commission has authority pursuant to G. S. 1949, 55-703, as amended, (now G. S. 1959 Supp., [fol. 184] 55-703) to lawfully issue such order with respect to one company, *a fortiori*, the Commission may lawfully promulgate and adopt a rule requiring all gas purchasing companies to take natural gas ratably from all wells within the same common source of supply to which each is connected.

We therefore hold Rule No. 82-2-219 and the order promulgating it are valid and lawfully adopted pursuant to the power conferred upon the State Corporation Commission by the provisions of G. S. 1949, 55-703, as amended.

The judgment of the lower court is affirmed.

SCHROEDER, J., dissents.

[fol. 185] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,127

NORTHERN NATURAL GAS COMPANY, a corporation, Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Appellee.

Appeal from the District Court of Finney County, Kansas.

Honorable Roland H. Tate, Judge

NORTHERN NATURAL GAS COMPANY'S MOTION FOR REHEARING—Filed June 30, 1961

Appellant, Northern Natural Gas Company, after a careful review and consideration of this Court's opinion, decision and judgment entered in the above captioned appeal, does hereby respectfully move this Honorable Court to set aside its said opinion, decision and judgment, entered and filed herein on June 10, 1961, to grant appellant a rehearing thereof and upon such rehearing or otherwise to set aside the purported ratable take order directed at appellant, and modify its judgment herein by construing G.S. 1949, 55-703, as amended by the legislature in 1959, as exclusively a statute relating to the production of gas and not to the purchase thereof, so that such construction by this Court will not result in a conflict with or impinge upon or invade the jurisdiction of the Federal Power Commission under the provisions of the Natural Gas Act, 15 U.S.C.A. 717, thereby [fol. 186] avoiding the consequences resulting from any attempt by the State of Kansas to regulate in any manner sales of gas in interstate commerce for resale and natural gas companies, parties to such sales. This is a companion case to the case of Northern Natural Gas Co. v. State Corporation Commission, 188 Kan. ——, —— P. 2d ——, No. 42,128, decided by this Honorable Court on June 10, 1961,

in which case appellant has filed motion for rehearing. Since the Court in this case, No. 42,127, states " • • • , the facts upon which the rule was promulgated in the instant case are in all material respects identical and present the same issues as the companion 'show cause' case," and since appellant desires to advance the same reason for its motion for rehearing in each of these companion cases there is attached hereto marked Exhibit "1", made a part hereof and incorporated herein, copy of appellant's motion for rehearing in Case No. 42,128.

For each and all of the reasons and based upon the authorities set forth in the foregoing motion and exhibit thereto, appellant respectfully requests the Court to set aside its decision of June 10, 1961, in captioned appeal, to grant appellant a rehearing thereof and upon such rehearing or otherwise to set aside as invalid the Commission's order and rule.

Respectfully submitted,

Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, Mark H. Adams, II, John S. Seeber, Floyd E. Jensen, Wichita 2, Kansas; Lawrence I. Shaw, F. Vinson Roach, Patrick J. McCarthy, 2223 Dodge Street, Omaha, Nebraska; Ray H. Calihan, Logan N. Green, Daniel R. Hopkins, Ray H. Calihan, Jr., 118 West Pine Street, Garden City, Kansas, Attorneys for Appellant, Northern Natural Gas Company.

[fol. 199] Acknowledgment of Receipt of Appellant's Motion for Rehearing and Waiver of Formal Proof of Service Thereof (omitted in printing).

[fol. 200]

IN THE SUPREME COURT OF THE STATE OF KANSAS

Motion by appellant for Rehearing is Denied.

NORTHERN NATURAL GAS Co., Appellant,

42,127 v.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Appellee.

JOURNAL ENTRY OF ORDER DENYING MOTION FOR REHEARING—September 19, 1961

[fol. 201]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,127

NORTHERN NATURAL GAS COMPANY, a corporation, Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—November 17, 1961

I.

Notice is hereby given that Northern Natural Gas Company, a Corporation, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, the highest court of such state, affirming the judgment of the District Court of Finney County, Kansas, upholding and sustaining the validity of an order and accompanying rule

issued by the Corporation Commission of the State of Kansas directing each purchaser of natural gas in each common source of supply under proration in Kansas to take gas in proportion to the allowables from all the wells to which it is connected, which judgment was entered in this action on the 10th day of June, 1961, and became final on the 19th day of September, 1961, by that Court's denial, [fol. 202] without opinion, of appellant's motion for rehearing.

This appeal is taken pursuant to 28 U.S.C.A. 1257(2), 62 Stat. 929.

II.

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. Abstract of record as prepared and filed by appellant, including any Appendix thereto, together with the proof of service thereof;

B. Counter abstract of record as prepared and filed by appellee, including any Appendix thereto, together with the proof of service thereof;

C. Opinion, decision and judgment of the Supreme Court of Kansas entered June 10, 1961, showing that Mr. Justice Schroeder dissents;

D. Appellant's motion for rehearing as filed, together with proof of service thereof;

E. Docket entry or order of the Supreme Court of Kansas as entered September 19, 1961, denying, without opinion, appellant's motion for rehearing; and

F. This notice of appeal, together with proof of service thereof.

III.

The following Federal question is presented by this appeal:

Does the State of Kansas have jurisdiction, under the guise of regulating production and in the face of the provisions of the Natural Gas Act and Federal Power Commission regulations thereunder, to control the sale of natural gas in interstate commerce for resale after the production and gathering thereof has ended, by directing a natural gas company purchaser, operating under subsisting gas sales [fol. 203] contracts with its producers, to make its purchases in a manner or at a rate contrary to such contracts which are on file with the Federal Power Commission as effective rate schedules and on which Certificates of Public Convenience and Necessity authorizing such sales have been issued?

Dated this 17 day of November, 1961.

Mark H. Adams,* Mark H. Adams, II, Joe Rolston, 503 Colorado Derby Building, Wichita, Kansas; Lawrence I. Shaw, F. Vinson Roach, Jack C. Osborne, Patrick J. McCarthy, 2223 Dodge Street, Omaha, Nebraska, Attorneys for Appellant, Northern Natural Gas Company.

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* Attorney upon whom service should be made.

Acknowledgment of Service (omitted in printing).

[fol. 204] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,128

NORTHERN NATURAL GAS COMPANY,
a Corporation, Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE
STATE OF KANSAS, Appellee.

APPEAL FROM THE DISTRICT COURT OF FINNEY COUNTY, KANSAS
HONORABLE ROLAND H. TATE, JUDGE

Abstract of Record of Appellant, Northern Natural Gas Company—Filed August 25, 1960

Lawrence I. Shaw, F. Vinson Roach, Patrick J. McCarthy, 2223 Dodge Street, Omaha, Nebraska,

Ray H. Calihan, Logan N. Green, Daniel R. Hopkins, Ray H. Calihan, Jr., 118 West Pine Street, Garden City, Kansas,

Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, Mark H. Adams, II, John S. Seeber, Floyd E. Jensen, 202 Board of Trade Bldg., Wichita 2, Kansas,

Attorneys for Appellant, Northern Natural Gas Company.

[fol. 4] These proceedings relate to the regulation and proration of gas production in the Kansas Hugoton Gas Field initiated under "Basic Proration Order for the Hugoton Gas Field" promulgated by The State Corporation Commission of the State of Kansas March 21, 1944, pursuant to the following notice of hearing with respect thereto:

[fol. 5]

BEFORE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

Docket No. C-164,

Conservation Division

In the matter of establishing rules and regulations relating to the production, sale and conservation of natural gas in the Hugoton Field of Kearny, Finney, Grant, Haskell, Morton, Stevens and Seward Counties, Kansas.

NOTICE OF HEARING

The State Corporation Commission of the State of Kansas, to: All Producers and Purchasers of Natural Gas in Said Hugoton Gas Field, and to All Royalty Owners, Land Owners and Other Persons Anywise Interested Therein, Greetings:

You and each of you, are hereby notified that the State Corporation Commission of the State of Kansas did on the 11th day of September, 1943, promulgate and enter an order setting the above matter for hearing at the Allis Hotel in the City of Wichita, State of Kansas, on the 28th day of September, 1943, at 2 o'clock p.m.

You are hereby further notified that pursuant to said order the Commission has instituted an investigation, and directed that a hearing be held at said time and place for the purpose of determining whether the Basic Order heretofore entered in the above entitled matter, on October 28, 1942, should be amended so as to more fully carry out the intent and purpose of the statutes of the State of Kansas: that at said time and place evidence will be received and interested parties will be heard in connection therewith.

[fol. 6] All parties in anywise interested or concerned shall take notice of the foregoing and govern themselves accordingly.

State Corporation Commission of the State of Kansas, By /s/ Victor L. Kirk, Secretary.

Such Basic Proration Order for the Hugoton Gas Field, as amended, in effect on October 7, 1959 (the date of State Commission Order hereinafter complained of), was as follows:

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Docket No. C-164

Conservation Division

Order No. 44-3-21

In the Matter of Establishing Rules and Regulations Relating to the Production, Sale and Conservation of Natural Gas in the Hugoton Field of Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton, and Hamilton Counties, Kansas.

BASIC PRORATION ORDER FOR THE HUGOTON GAS FIELD
—In Effect on October 7, 1959

Now on this 21st day of March, 1944, this matter comes on for consideration and determination upon the investigation instituted by the Commission to determine whether the provisions of the Basic Order herein, as issued on October 28, 1942, should be changed, modified, or amended; [fol. 7] and the Commission, having heard the evidence at its hearing held at Wichita, Kansas, on September 28, 1943, having concluded its investigation, and being fully advised in the premises, finds that certain further additional facts have been ascertained concerning the Hugoton Gas Field and the proper method which should be used in fixing well quotas to the end that each developed lease will be enabled to currently produce its daily allowable so that ultimately such developed lease will have an opportunity to produce approximately the amount of gas which underlies such lease; that in order to properly carry out the intent of the statutes of the State of Kansas relating to the conservation of natural gas, that the Basic Proration

Order for the Hugoton Gas Field, dated October 28, 1942, should be rescinded and superseded by a new Basic Order; that in connection with such new Basic Order, and based upon the evidence before it, the Commission finds:

a. That the Hugoton Field is a common source of supply of natural gas located in Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton and Hamilton counties, Kansas.[1] The field extends south to the Kansas-Oklahoma state line and into the Oklahoma Panhandle. The exact boundaries of the field in Kansas are not definitely established due to the lack of sufficient development. It is indicated by present development that the Kansas portion of the field is sixty-five miles long and forty miles wide. Approximately 340 commercial gas wells have been drilled in said field and over 350,000,000,000 cubic feet of gas have been withdrawn from the common reservoir. Each and all of the wells have a daily [fol. 8] open-flow in excess of 750,000 cubic feet and the total combined open-flow of all the wells is approximately 4,200,000,000 cubic feet daily. The presently developed acreage held by production totals 217,600 acres as compared with an estimated proven acreage of 1,500,000 acres. Eighteen of the wells are not connected to pipe lines and are not producing, and have not produced in the past, any gas because of this fact, although some of them were drilled as long as eight years ago. The owners of the unconnected wells have, since their respective wells were completed, generally been ready and willing to make connections and sell their gas to the pipe lines purchasing gas from said field; most of said owners of unconnected wells have been refused pipeline connections. The connected wells have produced and are producing large quantities of gas.[2]

b. That the market demand for gas produced in the Hugoton Field in Kansas is approximately 238,000,000

[1] As amended by order dated October 13, 1948.

[2] As amended by order dated October 13, 1948.

cubic feet daily and it is therefore evident that the available production of the wells is in excess of the market demand for gas produced from the common source of supply, notwithstanding that said wells are produced at not to exceed twenty-five percent of their open-flow capacities. One hundred and eighty-eight of the wells are located on 640-acre tracts while eighty-four wells are on 160-acre locations. Since 1936, practically all of the drilling has occurred upon 640-acre tracts and, insofar as present and future drilling is concerned, 640 acres appears to be the standard drilling unit. Localized drilling [fol. 9] or development has occurred in several portions of the field but it is not, however, wholly concentrated in any one particular area.

c. That gas is found in porous limestone and dolomite and is encountered at an average depth of from 2,700 to 2,800 feet below the surface. Impervious shale bodies are encountered within the producing horizons throughout the field, but it is evident that the gas producing formations are interconnected and therefore constitute one common source of supply. The thickness of the gas-producing horizons or zones varies considerably, although a sand thickness of from fifty to seventy-five feet is representative of the geological conditions existing generally throughout the field. A fair average porosity for limestone bodies such as are encountered in the Hugoton Field is 18.2 percent. The number of gas-producing horizons, as shown by the well logs or drill cuttings, varies between wells and tracts, most of them containing from three to five gas-producing zones.

d. That the virgin shut-in wellhead pressure was 435 pounds per square inch, while, at the present time, shut-in wellhead pressures have been observed as low as 371 pounds. Likewise, variations in the pressures as between wells and leases exist throughout the field. The movement of gas within a common reservoir is governed by pressure differentials; the gas migrates from the areas of higher pressure to the areas of lower pressure. In its virgin state, the pressure within a common source of supply is the same, or practically the same, at all points.

When gas is produced from a well, the pressure within [fol. 10] the reservoir is produced in the vicinity of the well bore. This causes gas in the formation to expand into the well. When a producing well is shut in, the pressure in the formation in the vicinity of the well will build up from that existing during production and this again tends to equalize the pressure within the formation and demonstrates that the continued migration of gas from high pressure to low pressure areas is occurring. Gas migrates within the reservoir from developed leases having higher pressures to other developed leases having lower pressures in accordance with the same principles which govern the movement of gas from the formation into the several well bores. If the migration or drainage of gas across property lines is not equalized by counter-drainage, the developed leases so drained will not ultimately produce approximately the amount of gas underlying them, either at the time the wells were drilled thereon or at the time this order becomes effective. The extent of the movement or drainage of gas between developed leases depends upon the magnitude of variation in pressures existing as between developed leases, the areas contained in such leases and the amounts of gas withdrawn.

e. That the evidence demonstrates that pressure differentials or gradients exist within the reservoir and between developed leases located sufficiently close to each other to cause drainage between such leases. The shut-in wellhead pressures of some of the said unconnected wells have decreased since they were originally tested, even though the said wells have not produced any gas. Since pressure is one of the measurements of the amounts of [fol. 11] gas within the reservoir, the decreases in pressure within the reservoir under leases containing wells which have produced no gas show that gas has been drained from such leases to or toward other developed leases, having pipeline connections, in greater quantities than it has moved to said leases. Therefore, uncompensated, cognizable and undue drainage has occurred within the common source of supply and between developed leases therein.

f. That since there exists disproportionate production from the wells and leases in said field which impairs the correlative rights of many of the owners of developed leases, it is necessary for the Commission to take jurisdiction and to prescribe regulations for the production of gas from said wells and others that may be hereafter completed in said field to the end that each person, firm, or corporation having the right to drill into and produce natural gas from said field may take therefrom only such proportion of the amount that may be produced therefrom without waste as will permit each well or developed lease to produce ultimately at least approximately the amount of gas underlying the land or lease on which such well is located and currently produce proportionately with the other wells in said field. That the said disproportionate production which has occurred and is occurring has caused undue, cognizable, preventable and noncompensated drainage of gas from developed properties, tracts and leases to other developed properties, tracts and leases in and throughout said field; that various developed properties have suffered undue, premature and inequitable depletion by reason of such conditions and practices, as [fol. 12] is evidenced by the differences in the shut-in well-head pressure of the various wells throughout the field. The wells which have produced the greater amounts of gas generally show the lower pressures, while the wells which have had smaller withdrawals generally show the higher pressures. Wherever this is not true, the fact that wells which have produced considerable quantities of gas, have not suffered material decreases in pressure, indicates that they have probably drained adjoining leases to a greater extent than the wells which show pressure declines. The present and past production from the wells in said field is and has been inequitable and unfair and has caused unreasonable discrimination against various developed properties, denying to many owners of developed properties the opportunity to produce currently and proportionately with the owners of other wells in said field, and denying to many owners of developed properties the opportunity to ultimately produce at least approximately the amount of gas underlying their developed tracts.

g. That one well completed in the said formation can adequately and sufficiently drain 640 acres without causing waste and considering the cost of drilling, equipping and operating one well in comparison with the estimated recovery per acre and the slow rate at which the production for said field can be ratably and nonwastefully marketed, the Commission finds that the basic acreage unit to be used in the proration formula hereinafter prescribed should be 640 acres, and that in no instance shall more than 640 acres be attributable to a well for the purpose of calculating the acreage factor except by specific order of the Commission as hereinafter provided. [fol. 13] The acreage factor of a well shall equal the number of acres held by production from said well divided by 640. Expressed in a mathematical formula, said acreage factor may be set forth as follows:

$$\text{Acreage Factor} = \frac{\text{No. of acres attributable}}{640}$$

In the event that more than one well is located on any one lease, the acreage to be used in calculating the acreage factor of each well on such lease shall be determined by dividing the total number of acres by the number of wells, and the quotient thereof shall be the acreage used in making said calculation. To be considered as attributable to a well, the acreage shall be contiguous or adjoining, with the well located as near as practicable in the center thereof, and in no event nearer than 1,250 feet from any boundary line of the unit; except, however, that this restriction shall not apply to leases or tracts which have already been unitized in compliance with previous orders issued by the Commission, or to wells now in existence and located on tracts containing less than 640 acres.

Such wells, now in existence, and located on tracts containing less than 640 acres, may be attributed acreage which is held by production from such well, if such acreage is located within a two-mile radius of the well, or upon application, and after notice and hearing, the Commission may authorize the inclusion of acreage as being attributable to a well now in existence if the acreage lies within a

three mile radius of the well and if, upon hearing, it is shown to the Commission that it is impossible or impracticable to unitize the tract upon which such well is located [fol. 14] with other acreage lying within two miles thereof: *Provided, however*, That the Commission may, either on complaint filed, or upon its own motion, after notice and hearing, exclude any acreage from inclusion in any unit which, in its judgment, is not productive and which should not be considered as proven acreage.

The term "held by production," as used in this paragraph shall mean that acreage so held participates in the production upon a royalty basis and does not receive delay rentals.

That there are located in the field certain so-called "short" sections, according to the United States Governmental Survey, and that some of such sections contain materially less than 649 acres. Wherever possible, such sections should be unitized among themselves, or with other leases or tracts, in order to form units of approximately 640 acres: *Provided, however*, That short sections located along the Kansas-Oklahoma state line shall be unitized only with the tracts immediately north thereof and the units thus formed may contain more than 640 acres.

In cases where it is impossible to create such units, the Commission may, upon proper application, authorize the unitization of such short sections containing materially less than 640 acres with other tract or tracts, and under such conditions the acreage attributable to any well or wells located upon such unit may be greater than the 640 acres hereinbefore provided. However, no such unit shall receive an acreage factor attributing more than 640 acres without an express order of the Commission, and no presumption shall arise from this order that such authoriza- [fol. 15] tion will be granted in any specific instance, and in no instance shall any unit so formed be granted more than 800 acres. It is further provided, that producers and owners of gas wells which were completed prior to January 30, 1940 (being the date upon which the first basic order of proration was issued herein), who also possess the right to produce natural gas from other lands and leases within

the limits set forth in this provision, may attribute such lands and leases, not exceeding 640 acres, to a unit for production hereunder (whether such leases are held by delay rentals or otherwise) for a term not exceeding one year from the date hereof. Within such period of one year the owner or producer of such wells shall file with the Conservation Director satisfactory evidence that the owners of the minerals have become participants in the royalty payments as otherwise hereinafter required. Any such lands which are not within said period so unitized for purposes of sharing the royalties from the wells shall henceforth be excluded as a part of any such production unit.

That there are located in the field certain so-called "long" sections, according to the United States Governmental Survey, and that such "long" sections lie along the north (correction) line of Township 26 South in Hamilton, Kearny, and Finney counties, and that such "long" sections contain materially more than 640 acres. The Commission finds that, notwithstanding anything else in this order to the contrary, the acreage permitted to be attributable to any well drilled in accordance with rules in any one of such "long" sections may exceed 640 acres but shall not exceed 900 acres, and that the acreage factor for [fol. 16] any well located in a "long" section shall be equal to the number of acres not in excess of 900 acres, attributed to such well divided by 640. Expressed in a mathematical formula, said acreage factor for such a well may be set as follows:

$$\text{Acreage Factor} = \frac{\text{No. of acres attributable}}{640}$$

In the event that more than one well is located in any of the so-called "long" sections, the acreage to be used in calculating the acreage factor of each well on such "long" section shall not exceed 640 acres. To have in excess of 640 acres considered as attributable to a well drilled on any such "long" section, only one well shall be drilled thereon in accordance with these rules, the acreage attributable shall be contiguous or adjoining and all such acre-

age attributable shall be located within the boundary lines of the "long" section on which the well is located. No acreage located without the boundary lines of such "long" section on which only one well is located shall be considered in figuring the acreage attributable to such well. The well, when only one well is to be drilled to any one "long" section, may be drilled, at the operator's discretion, at any point within the "long" section not farther than 467 feet from the center thereof; in no event shall the well be located nearer than 1,250 feet from the boundary line of the "long" section.

Any well capable of producing natural gas, in existence at the time of the adoption of this order, located in any of the subject "long" sections, shall be considered as the well for such "long" section, regardless of its location [fol. 17] within the section, and shall be entitled to have attributed thereto, when properly unitized, acreage within said section not in excess of 900 acres.[3]

h. It shall be lawful for the owners of two or more separately-owned contiguous tracts of land, or of the minerals located thereunder, by appropriate contract between such owners, to cause such lands or minerals to be consolidated as one production unit and to apportion the royalties accruing from the production of the well or wells, to be divided among them as they may agree and when such agreement shall have been made, the royalties arising from the production of the well or wells shall be allocated as the parties thereto may agree. It shall further be lawful for any operator or well owner to agree with the owners of lands or minerals to become part of a production unit and to share the royalties upon such basis as the operator and landowner or mineral owners may agree.[4]

i. That the producers in the field have been required, by custom, to lay gathering lines from their wells to the pipe lines of the purchasers. A lease is, therefore, undeveloped until a gas-producing well has been completed

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[3] As amended by orders dated April 2, 1947, and August 21, 1950.

[4] As amended by order dated January 10, 1946.

thereon and the owner or operator thereof has tendered gas to a purchaser at the purchaser's pipe line. Before a well is entitled to an allowable, the owner or operator thereof should either tender the gas for sale at the prevailing price being paid in the field to a pipeline company or others who are purchasing in the field in which such [fol. 18] a well is located, or demonstrate that he will and can produce the gas allowed such a well for lawful purposes. Such tendership may be shown by constructing a line from the well to such pipe line or other purchasing facilities or by filing with the Director of the Conservation Division an affidavit setting forth that the said producer is ready, willing and able to construct said line from the well to the facilities of the purchaser, and to sell gas to the purchaser at the prevailing price in the field, but that the purchaser refuses to buy the gas when so tendered. In the event that such purchaser seeks to controvert the fact or the terms of any such tendership, such purchaser may file a protest with the Commission setting forth the facts upon which such purchaser relies in making his protest, and the Commission shall, after due notice to all interested parties, hear the protest and determine whether or not, under all of the facts and conditions existing, that such tender should not be considered as having been properly made, and whether the well shall be entitled to an allowable as a result of such tender.

j. The adoption of a formula that will enable each well to currently produce its allowable and ultimately produce approximately the amount of gas underlying the lease upon which it is located is the object sought to be accomplished by this order. The testimony at the numerous hearings held by the Commission indicates that there are many factors which should be considered in connection with the formula, such as, acreage, pressures, open-flow, porosity and thickness of the pay. It is conceded by practically all of the witnesses that acreage is one of the most important of these factors and should be one of the [fol. 19] factors included in the formula. It is also the opinion of many of the expert witnesses that the other factors above enumerated, namely, pressures, open-flow,

porosity and thickness of pay, are all taken into consideration and given their proper weight when the deliverability of the well to put gas into a pipeline against pipeline pressure is taken into account. Therefore, a formula that considers acreage and deliverability and gives due value to both should result in the establishment of well allowables that will permit each well to currently produce its allowable and to ultimately produce approximately the amount of gas which underlies the lease upon which it is located. Since the pipeline pressures in the Hugoton Field are maintained at approximately eighty percent of the average field pressure, this fact should be taken into consideration in determining the deliverability factor. Hence, the Commission finds that the formula to be used in fixing well quotas for the Hugoton Field should include the factors of acreage and deliverability. The acreage factor shall be determined as set forth in paragraph "*g*" of this order. Deliverability shall be deemed to be the ability of said well to produce gas against eighty percent of the average field pressure.

k. The deliverability of each connected well in the Hugoton Field shall be determined as follows: The well shall be produced into the pipe line for approximately seventy-two hours, during which time the working pressure at the wellhead shall be maintained at eighty percent of the average shut-in wellhead pressure of the field, expressed in pounds per square inch gauge and designated [fol. 20] herein as the deliverability standard pressure, or as closely thereto as operating conditions in the field will permit. In no case shall the working wellhead pressure be more than ninety percent or less than seventy percent of the shut-in wellhead pressure of the well being tested unless, in the judgment of the Commission's representative, it is impractical to maintain the pressure within the above-described limits. If it is impossible or impractical to reduce the working pressure to ninety percent of the shut-in pressure, the deliverability shall be calculated by substituting ninety percent of the shut-in wellhead pressure of the well for P in the formula hereinafter set forth. Flow shall be

measured by approved meter throughout the seventy-two hour test period, and the wellhead pressure shall be measured by dead weight gauge at the close of the test period. The rate at which the well is producing at the end of seventy-two hours shall be considered the stabilized producing rate corresponding to the working wellhead pressure existing at that time, provided such rate is not greater than the average producing rate for the entire seventy-two hour period. If the working wellhead pressure at the close of the test is exactly equal to the deliverability standard pressure, then the corresponding stabilized producing rate, expressed in M. c. f. per day at a base temperature of sixty degrees Fahrenheit and a base pressure of two pounds above afmosphere, shall constitute the well's deliverability. If the wellhead pressure at the end of the test is either greater than or less than the deliverability standard pressure, the observed stabilized producing rate shall be converted to deliverability by use of the following formula:

[fol. 21]

$$D = R \times \sqrt{\frac{P^2 - P_d^2}{P^2 - P_w^2}} \quad .85$$

where D = Deliverability.
R = Observed producing rate.
P = Shut-in pressure of the well, pounds absolute.
P_d = Deliverability standard pressure, converted to pounds absolute.
P_w = Working wellhead pressure at Rate R, pounds absolute.

The term "working wellhead pressure," as used in this paragraph, refers to pressure at the casing-head, except in cases where the casing-head is not in open communication with the producing formation because of the presence of a packer or other obstruction in the annular space between casing and tubing. In such cases, the working wellhead pressure shall be calculated by adjusting the tubing pressure for the increased effect of friction caused by flow through the tubing.

Shut-in wellhead pressure shall be measured by dead weight gauge after the well has been shut in for approximately seventy-two hours. In no case shall the well have been shut in for less than sixty-six hours nor more than seventy-eight hours at the time the shut-in pressure is taken. If the representative of the Commission should for any reason believe that the shut-in pressure taken upon a well is incorrect, he may require that such well be blown to clean fluids from the well bore, or take any such other reasonable steps that may be necessary to get a true pressure upon the well. In the event that more than one shut-in pressure is taken upon a well during the test period, [fol. 22] the highest such shut-in pressure obtained will be used in figuring the deliverability of such well.

The deliverability of each unconnected well which is recognized by the Commission as entitled to an allowable shall be estimated from its open-flow considered in connection with the average relationship between open-flow and deliverability for all wells in the field. When such well is connected to a pipe line its deliverability shall be redetermined by the method described herein.[5]

l. To determine a well's quota for a given proration period, determine first the proration factor for the field by dividing the total field allowable for such period by the sum of the products of deliverability times the acreage factors of all the wells in the pool; then multiply the field proration factor by the product of the deliverability times acreage factor for the well. The result reached by this calculation shall constitute the well's allowable, in cubic feet, which it may produce for such proration period.

m. That the production of gas in accordance with the above formula has a reasonable relation to prevention of waste, to the prevention of inequitable and unfair production of gas from the common source of supply, and to the prevention of unreasonable discrimination in favor of one producer in said field and against another producer therein and that production of gas in such manner will in fact

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[5] As amended by order dated October 3, 1945.

accomplish the purposes for which article 7, chapter 55, General Statutes of Kansas for 1935 was enacted.

[fol. 23] *n.* That there shall be held two market demand hearings for each year. The first hearing shall cover the period from October 1 to March 31, both inclusive, and the second shall cover the period from April 1 to September 30, both inclusive. The allowable period established shall be a calendar month. The Commission shall issue its orders covering each allowable period, and such orders shall be issued on, or near, the first day of the month for which such order is issued.

o. At such time and place as the Commission shall fix, the Commission will, after notice, conduct a hearing to determine the market demand for natural gas from said field for the next six succeeding proration periods, or for such other period of time as the Commission shall prescribe, and at said hearing may determine any other questions which may properly and legally come before the Commission for consideration thereat, and a new schedule of production allowable for the wells in said field, based upon the determination made as a result of such hearing, shall be prepared and promulgated for the ensuing proration periods.

p. Operators of wells and purchasers, or others taking gas from any well, shall endeavor to limit their takes of gas to the quantities fixed in the schedule as the allowable production for such well, provided that, if, during the period covered by any schedule there should develop a substantial increase in the amount of the market demand for gas from said field, the Director may permit production to be increased ratably from all the wells in the field to meet such emergency increased demand and the facts respecting same shall be reported to the Commission at or [fol. 24] before the next periodic market demand hearing for such action thereon as may be proper. If, at the end of any proration period, there is an overage or underage in production for any well during such period, same shall be carried forward as a charge against or credit in favor of such well and subtracted from or added to, as the case may be, the allowable for such well for the next proration period. Any well with an overproduction of six times the amount

of the current allowable assigned to it for the preceding January shall be shut in by the operator or producer and not permitted to produce any gas until such overproduction has been reduced by deductions from such overproduction made by current allowables, to the extent that the well shall not be overproduced more than five times the current allowable assigned to it for the preceding January. When any connected well has accumulated underproduction in excess of six times the current allowable assigned to it for the preceding January, such excess shall thereupon be cancelled and the amount so cancelled shall be spread among all the connected wells of the field. During the calendar year 1958 all wells over or underproduced shall be brought within four times January sometime during the period from February 1 to July 31, inclusive. During the calendar year 1959 all wells over or underproduced shall be brought within six times January sometime during the period from February 1 to July 31, inclusive. During the calendar year 1960, all wells over or underproduced shall be brought within three times January sometime during the period from February 1 to July 31, inclusive. During the calendar year 1961 and each year [fol. 25] thereafter, all wells over or underproduced shall be brought down to zero sometime during the period from February 1 to July 31, inclusive. Any overproduced well which is not brought within the above tolerance sometime during each of the aforesaid periods shall be shut in until its overproduction is reduced to the above tolerances. Any underproduced well which is not brought within the above tolerance sometime during each of the aforesaid periods shall have its accumulated underage in excess of the above tolerances cancelled. (The words "six times January" "four times January" or "three times January" means six, four or three times the allowables assigned to the well for the month of January immediately preceding.) Any underages cancelled shall be spread among all of the connected wells of the field. Any underage so cancelled shall not be considered in the determining of the future production of any such well, unless, upon notice and hearing, the Commission shall otherwise determine: Provided, however, That

in no event shall any underproduction of an unconnected well be cancelled.*

q. Deliverability tests and seventy-two hour shut-in pressures of the wells in said field should be taken by or under the supervision of the engineer of the Conservation Division of the Commission, with the aid of the owner of the well, such tests to be taken annually on all wells by not later than August 14th of each year. To avoid undue discrimination, deliverability and pressure tests on all wells should be taken at approximately the same time. Prior to the testing of any well, reasonable notice shall be given to [fol. 26] owners of off-set wells stating the time at which such test will be commenced. A written report thereof, signed by the persons taking and witnessing the same and approved by the Director or his agent who took or supervised the same, shall be made and filed with the Director of the Conservation Division, forms for which shall be furnished by the Director. The acreage of each well shall be certified in writing by the owner of the well and filed with the Director. If the acreage assigned to any well should be increased or decreased at any time after the initial report thereon is made, such fact shall be promptly certified by the owner to the Director. Any operator in the field shall have the right to challenge the correctness of the acreage assigned to any well. As new wells are brought in, their respective deliverability and acreage factors, as well as pressures, shall be taken, reported and certified in like manner.

r. The Director of the Conservation Division shall prepare production schedules, in accordance with the provisions of this order, for the wells in said field and submit the same to the Commission for approval and upon the approval thereof, said schedules will take effect and be promulgated, and the Director shall promptly furnish to each producer and purchaser in said field a copy thereof and a copy of the order of the Commission promulgating the same and they shall govern themselves accordingly in the subsequent operation of said wells.

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* As amended by order dated July 15, 1959.

s. All wells shall be equipped with meters of an approved type and the amount of gas produced from each well shall be accurately measured: *Provided*, That where more than one well is situated on a lease, a meter for each [fol. 27] well is not required if, upon application and proper showing, the Commission finds that all the gas produced from the wells may be accurately measured so as to determine whether production is ratable and without unreasonable discrimination.

t. To avoid the drilling of unnecessary wells and to prevent waste, no well hereafter drilled in said common source of supply shall be assigned an allowable unless the Commission after due notice and hearing, shall find that under all the circumstances appearing, undue or uncompensated drainage of gas is occurring beneath the tract on which such well is located or that there is an actual need for additional wells to furnish gas to fulfill the market demands for gas from said field.

u. That this order should constitute the Basic Order for the proration of production in said field on and after March 31, 1944, and until amended, changed, or modified by further order of the Commission.

It Is, Therefore, by the Commission Ordered: That the Basic Order heretofore entered herein dated October 24, 1942, be and the same is hereby rescinded; that this order shall constitute and is hereby designated as the Basic Order for the proration of production of gas from the Hugoton Gas Field; that the production of natural gas from said field be, and the same is hereby regulated and restricted in conformance with the findings hereinabove made and in compliance with the formula, rules, regulations and other matters therein contained.

It Is Further Ordered: That this order shall take effect and be in force from and after the 31st day of March, [fol. 28] 1944, and shall remain in force and effect until amended, changed or modified by the further order of the Commission.

It Is Further Ordered: That the Commission hereby retains continuing jurisdiction of the subject matter hereof and of the parties hereto for the purpose of issuing from

time to time such further order, amendments, additional orders, rules and regulations as may be necessary and proper in the premises.

By the Commission It Is Ordered.

(Seal)

Pursuant to Paragraph (n) of such Basic Proration Order, two market demand hearings for each year were and are held by such Commission and market demand orders are issued for sixth-month periods (October 1 to March 31, and April 1 to September 30), in addition to which monthly proration or allowable orders are issued for each month spreading and allocating the market demand and fixing the monthly allowables assigned to each of the producing gas wells in said field.

That under date of May 27, 1959, said Commission issued a Show Cause Order against Northern Natural Gas Company, which order was as follows:

[fol. 29]

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Docket No. 60,740-C (C-7216)

Conservation Division

In the Matter of Northern Natural Gas Company to Show Cause.

ORDER TO SHOW CAUSE—May 27, 1959

Now on this 27th day of May, 1959, the Commission (Marion Beatty, Chairman, Harry G. Wiles and Richard C. Byrd, Commissioners) on its own motion, instituted an investigation in the premises hereinafter stated, and having examined its files and records, finds:

1. That Northern Natural Gas Company, a Delaware Corporation, with its principal office in Omaha, Nebraska, is a purchaser of natural gas in the Hugoton Field of Kansas.

2. That Northern Natural Gas Company is connected to and purchases gas from a large number of wells in the Kansas Hugoton Field, including a large number of wells owned by Cities Service Oil Company.

3. That evidence presented to the Commission in the public hearing held May 21, 1959, in Wichita, Kansas, in connection with Docket No. 60,043-C (C-7063) indicates that for several months past, Northern Natural Gas Company has not taken the full allowable established by the Commission for the Cities Service Oil Company wells to which it is connected.

4. Evidence presented at said hearing indicates further that Northern Natural Gas Company has not taken [fol. 30] ratably from the wells to which it is connected in the Hugoton Gas Field, and that as a result thereof correlative rights of producers in the field have been or will be violated.

5. That Northern Natural Gas Company should be ordered to show cause, at a public hearing hereinafter ordered, why it should not take ratably from the wells to which it is connected in the Hugoton Gas Field.

It Is, Therefore, by the Commission Ordered: That Northern Natural Gas Company be and it is hereby ordered to show cause why it should not take ratably from the wells to which it is connected in the Hugoton Gas Field of Kansas.

It Is Further by the Commission Ordered: That a public hearing herein be held at the District Court Room, Court House, Great Bend, Kansas, on Friday, June 26, 1959, beginning at 9 o'clock a.m., at which all interested parties are requested to appear.

By the Commission It Is So Ordered.

Raymond B. Harvey, Secretary.

(Seal)

That in said Commission's docket number in which such Show Cause Order was issued, said Commission on June 26, 1959, continued the hearing directed to July 24, 1959.

At such hearing the following parties appeared therein by counsel, to-wit:

[fol. 31]. APPEARANCES

Northern Natural Gas Company, Republic Natural Gas Company, Cities Service Oil Company, Colorado Oil & Gas Corporation, Northern Pump Company, Southwest Kansas Royalty Owners Association.

Commission appeared by its Counsel.

Testimony of REX D. FOWLER.

Direct examination.

By Mark H. Adams of Counsel for Northern Natural Gas Company:

I am employed by Northern Natural Gas Company as assistant manager of its Gas Supply Department. This department consists of four divisions:

(1) The Gas Purchases Division which engages in the negotiation and completion of contracts covering additional supplies of gas.

(2) The Gas Reserves and Availability Division which engages in the computation of underground reserves and the long-term availability of gas therefrom.

(3) The Storage Division which engages in the development and operation of underground gas storage reservoirs, and

(4) The Gas Purchased Operations Division which is charged with the responsibility of administering the various gas purchase contracts between Northern, as Buyer, and independent producers, as Sellers, covering all of Northern's gas supply in the several states and fields from which it originates. This Division

makes nominations to State Commissions whenever [fol. 32] and wherever called for and allocates Northern's total system gas requirements to the several sources of supply and to individual wells within those sources.

I direct the activities of these four divisions of the Gas Supply Department as assistant manager thereof.

I have been employed by Northern Natural Gas Company for about 22 years in its Gas Supply Department and during all of that time my work has been in connection with the proration and allocation of Northern's gas requirements. From January of 1953 until April of 1959 I was manager of the Gas Purchased Operations Division heretofore mentioned. One of the chief functions of that Division is the proration and allocation of gas. The Kansas Hugoton Field has been one of Northern's most important sources of supply of gas from the inception of the company to the present time. Since April, 1959, I have been assistant manager of all four divisions comprising Northern's Gas Supply Department.

I am generally familiar with all of the Gas Purchase Contracts under which Northern buys gas in the Kansas Hugoton Field. At all times since the beginning of my services for Northern, one of my major responsibilities has been in the area of operations under its gas purchase contracts, including the allocation of Northern's markets to the various wells and contracts, payment for gas purchased, and generally coordinating Northern's operations for purchasing gas with the obligations and contractual provisions under such various contracts. Accordingly, I have been concerned during all of my employment with Northern with the application of various state gas pro- [fol. 33] ration laws to Northern's gas purchased operations. In this respect I am familiar with the Gas Purchase Contract between Northern Natural Gas Company and Republic Natural Gas Company dated December 21, 1945, and the predecessor contracts thereto and am familiar with the history of operations under those contracts.

The Gas Purchase Contract dated December 21, 1945, is what is usually referred to as "Republic 'A' Contract" under which Northern buys the gas from 144 Republic Natural Gas Company wells in the Kansas Hugoton Field. This particular Republic "A" Contract was identified as Exhibit "4". The initial contract in this respect was dated May 27, 1930, and was between Missouri Valley Gas Company, as Seller, party of the first part, and Argus Production Company, party of the second part, and Missouri Valley Pipe Line Company, as Buyer, party of the third part. Republic Natural Gas Company has succeeded to the interests of Missouri Valley Gas Company and Argus Production Company, and Northern Natural Gas Company has succeeded to the interests of Missouri Valley Pipe Line Company. Amendatory and supplemental agreements were completed by the parties under date of July 1, 1932, and February 4, 1939. Under date of December 21, 1945, the parties entered into a new gas purchase contract which superseded and cancelled the agreements previously referred to. Subsequently, there was an amendment under date of June 30, 1953. The Republic "A" Contract of December 21, 1945, as amended, remains in effect today and is the contract under which operations between the parties thereto are being conducted. The initial contract of May [fol. 34] 27, 1930, and the supplements and amendments thereto were thereupon identified as Exhibits "1", "2", "3", "4", and "5". The Republic "A" Contract dated December 21, 1945, was identified as Exhibit "4". All of such exhibits were then offered and received in evidence.

Article I of December 21, 1945, Republic "A" Gas Purchase Contract is as follows:

ARTICLE I

Gas to Be Purchased and Sold

Section 1. Sale and Purchase Commitments. Subject to the terms and conditions and within the limitations hereinafter set forth, Republic agrees to sell and deliver to Northern and Northern agrees to receive, purchase and

pay for natural gas in its natural state produced or purchased by Republic in the "Hugoton Area" which, for the purposes of this contract, is defined to mean lands located in Stevens, Morton and Grant Counties, Kansas, and Texas County, Oklahoma, and Counties in Kansas and Oklahoma immediately adjoining said Stevens, Morton of Grant Counties, Kansas, or Texas County, Oklahoma.

Section 2. Volume to be Purchased and Sold. The quantity of gas which Northern agrees to purchase and receive from Republic and Republic agrees to sell and deliver to Northern shall be sixty per centum (60%) of all gas which Northern may take or use, or cause to be taken or used, during the term of this contract, for the requirements of Northern for serving from its said pipe line and any extension thereof which Northern may make, all or any portion of that part of the States of Iowa and [fol. 35] Nebraska lying North of the 40th parallel of latitude and East of longitude 98 West of Greenwich (herein referred to as the "Omaha District"), which is hereby agreed to mean the total of:

(a) Sixty per centum (60%) of all gas sold by Northern in the Omaha District after adjusting sales pressure basis of measurement to the purchase basis of measurement, viz.: 16.4 pounds per square inch absolute pressure;

(b) Sixty per centum (60%) of all gas used as fuel at Northern's compressor stations located at Beatrice and Palmyra, Nebraska, and Oakland and Ogden, Iowa, measured on a basis of 16.4 pounds per square inch absolute pressure;

(c) Sixty per centum (60%) of all gas used as fuel at any other compressor station, or stations, except Ventura, which are now or may hereafter be constructed in the Omaha District measured on a basis of 16.4 pounds per square inch absolute pressure; provided, however, that in the event any such compressor station, or stations, shall be operated to compress gas for delivery to markets other than those located in the Omaha District, such 60% shall be

reduced in the same proportion that the volume of gas delivered therefrom to markets outside the Omaha District bears to the total volume compressed at said station;

(d) Sixty per centum (60%) of the volumes of lost and unaccounted-for gas measured at 16.4 pounds per square inch absolute pressure which shall be allocated to the Omaha District on the basis of the ratio of Northern's pipe-line miles of three-inch [fol. 36] equivalent within the Omaha District to the pipe-line miles of three-inch equivalent in Northern's total pipe-line system.

Section 3. Annual Minimum and Maximum Volumes. The aggregate volume of gas to be purchased by Northern and delivered by Republic hereunder during the twelve months' period beginning July 1 of each year shall not be less than 12,500,000,000 nor more than 36,500,000,000 cubic feet.

Section 4. Rate of Delivery. So far as practicable, and without interruption, Republic shall deliver and Northern shall take gas in accordance with Northern's market demands in the Omaha District, and Northern shall, from time to time, notify Republic of any anticipated substantial increase in such daily requirements; provided, however, that Republic shall never be obligated to deliver more than 100,000,000 cubic feet of gas during any 24-hour period; and provided further that it shall be deemed that Northern has complied with its obligation to take gas under this Article I if, on the 31st day of December of each year, Northern, so far as practicable, shall have taken during the preceding six months the volumes of gas specified herein, and if on or before June 30 of each year Northern shall have taken during the preceding twelve months the total amount of gas herein required.

The Republic "A" Contract, Exhibit "4", and the amendment thereto of June 30, 1953, Exhibit "5", are (minus acknowledgments and legal descriptions of leases) set out as appendices to this Abstract of the Record.

Tracing the history of the provisions in such contracts regarding the quantity of gas to be sold by Republic and [fol. 37] purchased by Northern, reference is first made to Article II of the old May 27, 1930, contract, Exhibit "1", the pertinent portion of which reads as follows:

> "The quantity of gas which Buyer agrees to purchase and receive from Seller and Seller agrees to sell and deliver to Buyer shall be, subject to the maximum and minimum amounts hereinafter provided in this article, sixty per centum (60%) of all the gas which Buyer may take or use, or cause to be taken or used, during the term of this contract, for the requirements of its said pipeline system (and any extension thereof which Buyer may make) serving all or a portion of that part of the States of Iowa and Nebraska lying north of the 40th parallel of latitude east of longitude 98 west of Greenwich, herein referred to as the Omaha District."

It should be noted that minimum and maximum quantities of gas are fixed for sale and purchase. The meaning of the words "Omaha District" is that area which embraces Northern's present markets in Iowa and Nebraska. The quantities specified in the contract were increased by contract amendments until the maximum amounted to 36.5 billion cubic feet. This amounts to 100 million cubic feet per day for a 365-day year. Referring to Article I Section 2 of the Republic "A" Contract (Exhibit "4"), it will be noted that the quantity amounting to 60% of the Omaha District requirement is again defined essentially in the same manner as it was defined in the original contract (Exhibit "1") dated May 27, 1930. This basic quantity obligation has been carried forward into the contract presently in effect.

[fol. 38] Northern Natural Gas Company was incorporated April 25, 1930. It first marketed gas from its newly constructed transmission line on September 9, 1930. The Gas Purchase Contract of May 27, 1930 (Exhibit "1"), constituted one of the two major sources of supply relied upon as a gas reserve to support Northern's proposed interstate transmission pipe line system. Initially, delivery of gas from Republic to Northern occurred under this

contract in August, 1931. From that time through 1935 the rate of purchase was controlled by the minimum volumes specified in such contract and the amendments thereto. Commencing in 1936, 60% of Northern's requirements for serving the Omaha District exceeded the minimum volume specified in such contract and the rate of purchase was controlled by such requirements through the contract accounting year ending June 30, 1947. 60% of Northern's Omaha District requirements at that time was about 30 billion cubic feet of gas per year.

The Kansas Hugoton Gas Field was placed under proration by the State Corporation Commission effective April 1, 1944. Initially, the allowables assigned to the Republic "A" wells were sufficient to permit Republic to deliver to Northern 60% of Northern's requirements for serving the Omaha District. However, by 1947 the Omaha District requirements had grown to the point that 60% thereof exceeded the allowables of the Republic "A" wells and at the end of the contract accounting year, June 30, 1947, after Republic had delivered to Northern 60% of Northern's Omaha District requirement for that year, such Republic "A" wells were produced in excess of 4 [fol. 39] billion cubic feet over and above their allowables. Since June 30, 1947, Northern's rate of purchase from said Republic "A" wells has been controlled by the allowables granted thereto, Northern's Omaha District requirement having continued to grow.

This situation existing, a dispute arose between Republic and Northern concerning just how much gas Northern was required to purchase under the Republic "A" contract. This dispute was finally settled in the Supreme Court of the State of Kansas in the case entitled *Republic Natural Gas Company* v. *Northern Natural Gas Company* found at 172 Kan., page 450, in which the court determined that for each contract year (ending June 30 each year) Northern should regulate its purchases from the Republic "A" wells from time to time so that at the end of any given contract accounting year it will have purchased from the Republic "A" wells the volume of gas which Republic is entitled to produce and deliver to Northern

(under valid proration orders) for that particular year. Since that (Supreme Court) decision, Northern has endeavored to accept into its lines and purchase from the Republic "A" wells quantities of gas which will attain for such wells a zero status on the (State Corporation Commission) proration schedules at the end of each contract accounting year. By "zero status" I mean that said wells are allowed to produce their legal allowables and are neither over-produced nor under-produced in important amounts.

The history of Northern Natural Gas Company's purchase of gas in the Kansas Hugoton Field subsequent to the Republic "A" initial contract is about as follows: [fol. 40] While that initial contract was May 27, 1930 (Exhibit "1"), it was not until 1938 that Northern actively undertook to contract for the purchase of large volumes of additional gas supply in the Kansas Hugoton Field. During this time the Otis Gas Field in Kansas was developed and Northern's supply was supplemented by gas produced from that field. Beginning in 1938 and continuing until 1949, Northern contracted to buy additional gas supply in the Kansas Hugoton Field each year. Beginning about 1941, Northern began and carried out a program to develop leases which Northern had acquired in the Kansas Hugoton Field. Then in 1949 Northern contracted for the purchase of a large volume of gas under a Gas Purchase Contract with Cities Service Oil Company, as Seller, dated September 9, 1949, covering leasehold acreage which is, for the most part, several miles distant from the Republic "A" Contract acreage. After 1949 Northern continued to acquire additional supplies of gas, by gas purchase contract, from acreage in the Kansas Hugoton Field, generally in smaller acreage patterns than is covered in either the Republic "A" Contract or the Cities Service Oil Company Contract. Northern has, throughout the years, furnished a market outlet for many of the smaller wells in the Kansas Hugoton Field in the areas where the gas is of low B.T.U. content and where the wells, because of that fact, and because of their distance from other purchasing companies' gathering systems, would have been without any

participation in the market requirements for gas from the field. Many of these wells were connected to Northern's pipe line system without respect to whether or not Northern at any time needed gas therefrom to supplement its [fol. 41] gas supply. Currently, Northern has about 125 gas purchase contracts covering gas to be produced from the Kansas Hugoton Field under which producers have connected to Northern's pipe line system more than 1100 wells in said field.

I have already explained the provisions of the Republic "A" Contract dealing with the requirements for Northern's acceptance by purchase of gas produced thereunder. All of the other gas purchase contracts under which Northern purchases gas in this field, including that with Cities Service Oil Company, as Seller, contain express clauses requiring Northern to accept delivery of gas from the wells covered thereby ratably with all other wells to which Northern is connected in the Kansas Hugoton Gas Field, excluding, however, the volumes of gas Northern contracted to receive from the Republic "A" wells. Up to the present date, each and every gas purchase contract (other than the Republic "A" Contract) under which Northern buys gas in this field expressly refers to the requirements of the Republic "A" Contract and excludes the Republic "A" wells from the ratable take provisions in such contracts.

Exhibit "6" was then identified as the ratable take provision in the Gas Purchase Contract between Cities Service Oil Company, as Seller, and Northern Natural Gas Company, as Buyer, dated December 9, 1949, and as typical of the ratable take provisions in all of Northern's other contracts (except only the Republic "A" Contract). Exhibit "6" was then offered and received in evidence.

[fol. 42]

EXHIBIT 6

DKT No. 60,740-C
(C-7216)
Witness Fowler
July 24, 1959

EXCERPT FROM SEPTEMBER 9, 1949, NATURAL GAS PURCHASE CONTRACT BETWEEN CITIES SERVICE OIL COMPANY AND NORTHERN NATURAL GAS COMPANY

Section 3. Northern's Obligation to Purchase Gas.

(a) *Ratable Purchase of Gas.* Northern agrees to purchase and receive from Seller hereunder, subject to the provisions of subparagraphs (b) and (c) of this Section 3, gas produced from any common source of supply underlying the acreage described in Exhibits A, B, C and D, ratably (without discrimination) with all natural gas purchased and produced by Northern from the same common source of supply situated in the Kansas portion of the Hugoton Gas Field. Northern agrees to purchase and receive from Seller hereunder, subject to the provisions of subparagraph (c) of this Section 3, gas produced from any common source of supply underlying the acreage described in Exhibit E ratably (without discrimination) with all natural gas purchased and produced by Northern from the same common source of supply situated in the Oklahoma portion of the Hugoton Gas Field. Such ratable purchases shall be for such reasonable periods of time and computed under such proper and reasonable nondiscriminatory formulae as Northern may from time to time employ; provided, however, Northern agrees to con-
[fol. 43] sult with Seller prior to Northern's determination of any such formula.

(b) *Prior Obligations.* This contract is made expressly subject to the obligations of Northern under the following gas purchase contracts, and the volumes

of gas which Northern is obligated to purchase thereunder, plus such reasonable volumes of gas as Northern may take in excess of said volumes in order to avoid any penalty which might occur for failure to take the volumes Northern is obligated to purchase, are and shall be specifically excluded in the computation of the ratable purchase of gas as provided in subparagraph (a) of this Section 3, viz.:

(i) The gas purchase contract dated January 18, 1929, as now or hereafter amended or revised, with Panhandle Eastern Pipe Line Company, and Saturn Oil & Gas Company, Inc., or any new contract which supersedes said contract of January 18, 1929; and

(ii) The Gas Purchase Contract dated December 21, 1945, as now or hereafter amended or revised, with Republic Natural Gas Company, or any new contract which supersedes said contract of December 21, 1945.

It is further agreed that in the event Northern shall acquire the full interest in either of the respective properties from which gas is produced and delivered to Northern under either of the contracts above referred to, the foregoing provisions of this subparagraph (b) shall no longer be effective as to gas produced and delivered under that particular contract. It is also further [fol. 44] agreed that any amendment, revision or new contract, other than an extension of the term of the gas purchase contract of January 18, 1929, shall not operate to reduce Northern's obligation to purchase gas hereunder.

Within reasonable operating limits, Northern has at all times accepted delivery of gas ratably from all wells from which it purchases gas in the Kansas Hugoton Gas Field in accordance with the ratable take provisions of all of its gas purchase contracts. The 1100-plus wells connected

to Northern in this field are at locations from the southernmost to the northernmost ends of the field in Kansas, about 80 miles. The production therefrom is transmitted through three main compressor stations, several field gathering compressor stations, and many miles of gathering lines. Operating pressures and well pressures vary from time to time, and compressor plants are required to be closed down from time to time for mechanical repairs or overhauls. It is a very complex and prodigious job to maintain exact ratability in takes from all such wells, but through the years Northern has accepted gas, in accordance with the ratable take provision of its contracts, from all the wells in said field connected to its system. The leases and wells formerly owned by Northern in this field are now owned by its wholly-owned subsidiary corporation, Northern Natural Gas Producing Company. Such wells have delivered gas to Northern over any reasonable period of time ratably—at the same rate as all other wells in said field connected to Northern, except the Republic "A" wells—and have never been afforded any different treatment. To assure ratable take from such wells, the allocation of Northern's estimated requirements for gas from said field for any given month is accomplished on or about the first day of that month. While Northern is contesting the validity of the allowables fixed by the Commission since May of 1956, our calculations in this respect are made on the basis of Commission's allowables to avoid confusion.

[fol. 45]

Commissioner Beatty: I have a question right along the same line. Mr. Adams, when you say ratable take, do you mean—you don't mean ratable take between Republic "A" wells and all other wells, do you?

Mr. Adams: Yes, Your Honor. I believe when all of the testimony is all in, it will reflect, within reasonable operating limits, we have until just the last few months all during the years managed to take ratably from all wells connected to Northern's system without respect to this, what might be thought preferential, clause in the Republic "A" Contract. It will be our position that over a field where there is seventy years' production time that the short interval in which we are being compelled to give

preference in takes from the Republic "A" wells, in the long run will not result in actual unratable take. So, our testimony will proceed on the basis of endeavoring to show the Commission that we have reasonably taken on a ratable basis.

Commissioner Beatty: Notwithstanding the fact, if it is a fact, that "A" wells now are approximately in balance, and practically all other wells have accumulated large underages, is that right approximately as of now?

[fol. 46] Mr. Adams: That is correct as of now. We will have an exhibit to show the history ever since proration in the field of what has occurred with respect to taking from Republic "A" wells and all other wells to disclose to the Commission how nearly we have conformed to ratable taking from all wells connected to Northern's system. We confess that at the moment they are out of balance, but our intention is to get them back in balance within a reasonable time. I am not in a position to say how quickly it can be done, but certainly that is our intention.

Mr. Holl: My contention is that Northern Natural started out by laying the foundation for this testimony on the basis they are taking by introducing the contract, stating ratably under the contract. Strictly from that this conversation about taking ratably without any switch over and leaving the inference they are taking ratably at the present time is the thing I object to.

Chairman Wiles: Are you willing to restrict ratable take to ratable take under the contract?

Mr. Adams: No, Mr. Commissioner. There are two things. We contend that we have at all times taken ratably in accordance with our contract. We want to show the Commission the facts as to our taking, and why we have taken as we have taken. We believe those facts will show also that within reasonably operating limits until just the past few months we have actually taken ratably irrespective of the contract provisions.

Allocations of Northern's estimated requirements for gas from this field for any month, to assure ratable take in said field, are made in the following manner:

[fol. 47] The net allowable for the preceding month as

shown in the Commission's proration schedule is tabulated for each participating well.

The volumes shown in the Commission's schedules as having been cancelled from each such well for the period November, 1958, to date is similary tabulated and added to said net allowable for each well. From this result the estimated production for the preceding month is deducted. The result represents the status at the end of the preceding month as determined by the Commission plus volumes cancelled by the Commission. These status figures are then added together. To that total is added the estimated requirement for the current month under consideration and that total distributed among all participating wells in proportion to the individual adjusted deliverabilities of such wells.

As to each well, the difference between the volume thus distributed and the status thus determined from the Commission's proration schedules represents the volume that should be produced during the current month to maintain a precise ratable status, and is the allocation volume for the current month.

During periods when cancellation of underproduction is occurring, the above procedure will result in ratable cancellations.

There are many reasons why precise current ratable take cannot be attained. I shall mention a few of the more important ones. The total requirement figure for the current month is necessarily an estimate and may be changed either upwards or downwards to variations in the require- [fol. 48] ments of Northern's customers for gas. The yardstick used to determine ratability for the individual well is adjusted deliverability and will normally change once a year. Deliverability tests are taken once a year, and the testing procedures and volumes produced during the tests sometimes cause a distortion in ratable take. When a new well is connected to the system, several months may be required for such wells to attain the same relative position as the older wells. Some wells may, at times, be incapable of producing the required volume. The allocation procedure just outlined is followed as to all wells connected to Northern's system except during periods of time when

Northern's connection in such field are underproduced. When this situation exists, Northern's contractual commitment under the Republic "A" Contract, as interpreted by the Kansas Supreme Court—

Mr. Adams: As we understand it.

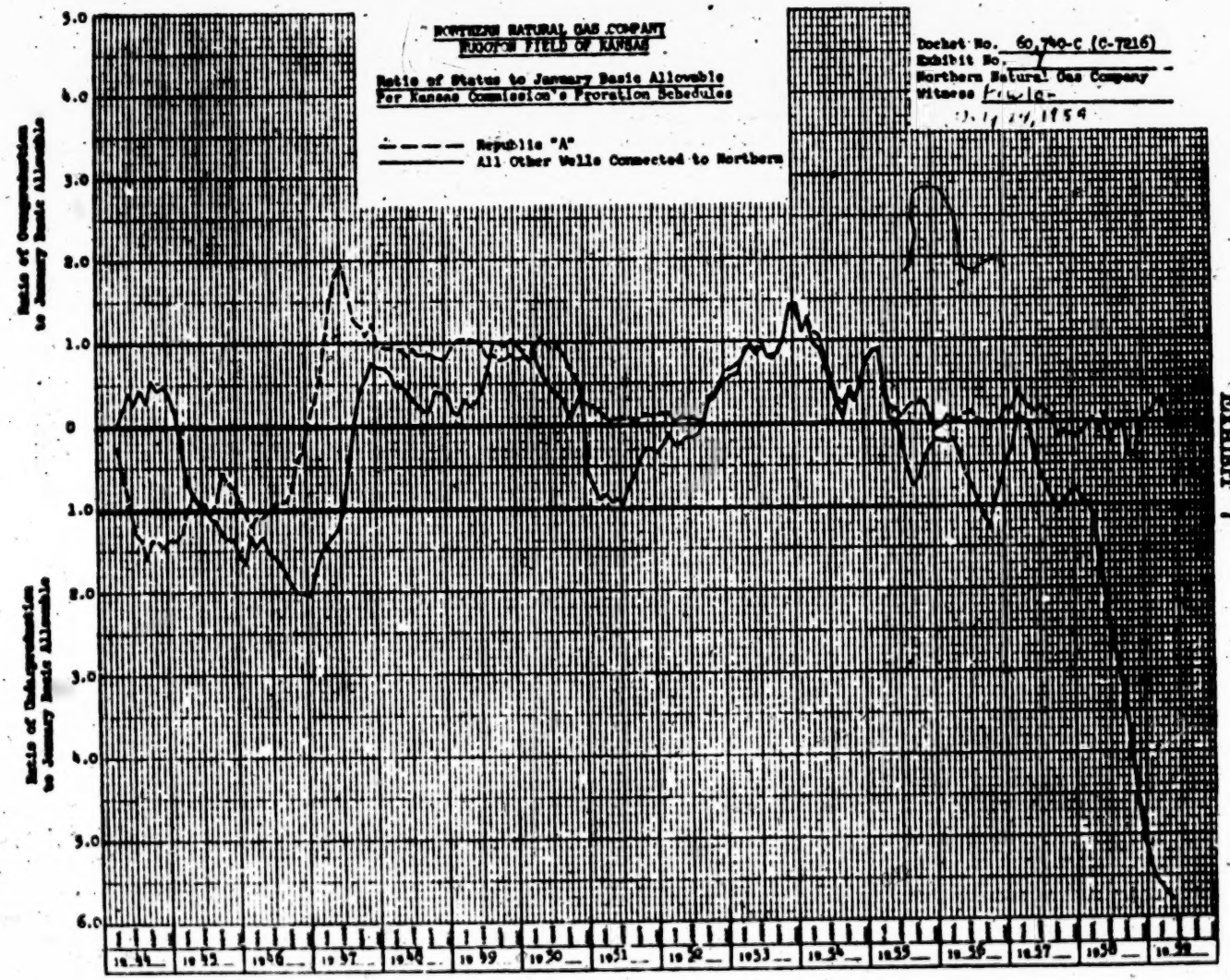
Mr. Jones (Attorney for Republic Natural Gas Company): Thank you.

A. —is deducted from Northern's total gas requirement from the Hugoton Field and allocated to the Republic "A" wells. The allocation to the other connected wells is then carried out in the manner previously outlined.

Q. Now, in your answer to this last question you made some reference to November, 1958, is that by reason of the fact that was the first month in 1958 in which there were any cancellations of any wells on Northern's system?

A. That is the first month in which any cancellations occurred of any significance, yes.

[fol. 49] Exhibit "7" was then identified as a graph showing the cumulative status to the preceding January Commission allowables for the Republic "A" wells as one item and for all other wells connected to Northern's system in the Kansas Hugoton Field as another item. In preparing this graph I have used the yardstick now in use by the Commission for determining when a well should be shut-in because of overproduction or when an allowable to a well should be cancelled due to underproduction. I have applied this yardstick for the entire period covered by the graph, which is from April, 1944, the effective date of proration in the Kansas Hugoton Field, through May 1959, which was the most recent month for which data was available.



[fol. 50]

EXHIBIT "Y"

[fol. 51] With reference to the zero line as indicated by the scale on the left-hand side of the graph, that portion of the graph above such zero line indicates overproduction, and that portion of the graph below the zero line indicates underproduction. Heavy horizontal lines have been used to indicate the zero line and to indicate when the wells are one-times the January allowable overproduction line. By that I mean it is the ratio of underproduction or overproduction at the end of any month to the preceding January allowables fixed by the Commission. The lines on the graph for the Republic "A" wells and the lines for the other wells as a group represent the ratio of cumulative Commission allowable status to the preceding January Commission allowable and do not represent volumes of gas as such. To illustrate, refer to the point on the graph for the month of January, 1945; the dashed line shows that Republic "A" group wells were then underproduced in the amount of about 1.4 times the applicable January Commission allowable, while the solid line representing other wells connected to Northern shows that group of wells were then overproduced in the amount of about .4 times the applicable January Commission allowable.

This graph reflects that for the entire period from April, 1944, through May, 1959, there were no important differences between the purchases from other wells for any extended period of time prior to the year 1958. That is, the differences in ratio is less than one-times the January allowable for essentially the entire period. Further, the lines cross at several points. A one-times January difference between the two graph lines, when converted into [fol. 52] volumes of gas and then into amount of reservoir pressure represented thereby, represents less than one pound of reservoir pressure, which is an insignificant amount.

It was not until the spring of 1958 that a wide divergence of the two lines appears. This was brought about for two reasons: First, as the Commission is well aware, allowables granted by the Commission to the field have exceeded the total field production by approximately 130 billion cubic feet and the wells connected to Northern, other than the Republic "A" wells, have become substantially underpro-

duced. Second, is the fact that Northern has been seriously delayed in expanding its system into new markets for gas by reason of the failure of the Federal Power Commission to issue the necessary Certificates of Public Convenience and Necessity. Given sufficient time, it is my belief that Northern will be able to conduct its operations in such a way that the two lines will again be brought together. This is based on the assumption that the Commission's future allowable assignments will be realistic, and on the further assumption that the necessary expansion certificates will be issued to Northern by the Federal Power Commission. There is good reason to believe that such certificates will be forthcoming. Detailed testimony and exhibits on Northern's proposed expansion of its facilities for the sale of greater volumes of gas were presented by Northern in Commission's Docket C-164 on January 23 and May 21, 1959, wherein Northern seeks a modification of Paragraph "P" of the Basic Proration Order for the Kansas Hugoton Field.

[fol. 53] Commission's June, 1959, Gas Proration Order and Report for the Kansas Hugoton Gas Field shows the status of all of the wells in said field with respect to over or underproduction. That order shows that the Republic "A" wells, as a group and pretty much well by well, have produced just about the allowables assigned to them by the Commission. All other wells connected to Northern are about equally underproduced with relation to the January basic allowable of each well within reasonable operating limits. There may be a few exceptions due to peculiar circumstances.

Exhibit "7" was then offered and received in evidence.

Upon application, the evidence taken in Northern's application to modify Paragraph "P" of the Basic Proration Order for the Hugoton Field of Kansas, in Commission Docket C-164 on January 23 and May 21, 1959, was incorporated in the record. This testimony related to Northern's efforts to secure Federal Power Commission certificates permitting expansion of Northern's facilities to reach additional markets and the status thereof (Tr. 31).

Cross examination.

By Mr. Ferd Evans (Attorney for Colorado Oil & Gas Corporation):

Starting in early 1958 the pattern changed sharply from what it was from the inception of time shown on Exhibit "7" with respect to whether or not Northern was taking gas approximately proportionately from the Republic "A" wells and from other wells connected to its system in the Kansas Hugoton Field.

By Mr. Evans:

Q. Mr. Fowler, is it literally true that all gas purchase contracts made by your company with producers other than [fol. 54] Republic are expressly subject to the provisions of Republic "A" contract?

A. Yes, that is right. In fact, we have one contract with Republic that is also expressly subject to the Republic "A" contract.

Q. You mean they are really all subject to Republic "A" contract?

A. That is right.

Q. I observe, Mr. Fowler, I am now looking at Exhibit "4" introduced by your company, that Article XII, Section 2, gas purchase contract of December 21, 1945; that section states: "This contract is subject to all valid legislation with respect to the subject matter hereof, either State or Federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction." I will ask you if the original contract of 1930 contained a similar provision?

A. I think I have found it now, sir. It is in Article XII, of Exhibit "1", to the contract of May 27, 1930. If you wish me to, I will read it.

Q. I will appreciate your reading it for my information and for the record.

A. "This agreement is subject to all present and future valid orders, rules and regulations of any regulatory body of the Federal government and the State or States in which said premises are situated."

Exhibit "7" does not reflect underproduction as such but is based on ratios which are determined from the status of wells as published in the Commission's schedules, and any cancellation of underproduction that had occurred prior to the month in question would have been excluded if such [fol. 55] underproduction exceeded six-times January allowable as provided in the basic order.

Cross examination.

By Mr. Dale Stucky (Attorney for Southwest Royalty Owners Association):

As far as facilities are concerned, it is not physically impossible for Northern to take gas ratably from the Republic "A" wells and all other wells connected to its system. Northern has taken its purchases of gas from the wells connected to its system in such field in accordance with its Gas Purchase Contracts and in accordance with the Kansas Supreme Court's decision interpreting the Republic "A" Contract as we have interpreted that decision.

I do not know of any rule or regulation or any statutory enactment that would prevent Northern from taking ratably from all wells to which it is connected in the Kansas Hugoton Field.

If the markets were sufficient so that Northern could take the current allowables from the Republic "A" wells and also take the current allowables from all other wells to it connected, then Northern's takes would be ratable as between all wells connected to its system. Where there is insufficient market to permit all of the wells to make their current allowables, then only the Republic "A" wells make their current allowables and the remaining wells ratably produce the balance of such market demand. In other words, when the market conditions are at the same level as the allowables then the same rate of take would exist between the Republic "A" wells and all other wells.

[fol. 56] Commissioner Beatty: Mr. Stucky and Mr. Adams, let's summarize. Doesn't the contract speak for itself and show that your Republic "A" wells are given certain preference over your other connections?

Mr. Adams: By contract, that is correct.

Commissioner Beatty: All right. Now, if certain wells are given preferences by contract, doesn't it follow that there is likely not to be ratable taking between those wells and other wells that are connected to Northern Natural; if one is given a preference, how can it be ratably? That is preventing the ratable taking, your preference provision of that contract, isn't that right?

Mr. Adams: There is no question about it. Since January or maybe a little into the year—I don't know, maybe March, 1958, there has not been ratable taking on the connections to Northern's wells as reflected in Exhibit "7".

Commissioner Beatty: From that point on isn't it purely a legal question as to whether or not the preferential provisions of your contract can take any preference over the statute requirements as to the ratable take and protection of correlative take, of following the rules and regulations by the Kansas Corporation Commission? Doesn't it follow that these contracts cannot take preference over the statutes and regulations of this Commission? What about that Mr. Stucky?

Mr. Stucky: I don't agree with the first premise.

Commissioner Beatty: What first premise?

Mr. Stucky: These contracts require preferential treatment one over the others. They do not require preferential treatment; they permit.

[fol. 57] Commissioner Beatty: The contracts are in evidence. They speak for themselves. They are the best evidence of what the contract is. I think, then, you can pick up the contract and argue from the contract—it is already in evidence—rather than arguing with the witness.

Q. Do you know of any reason why your company cannot take gas ratably from all wells connected to its system?

A. The present level of our markets will not permit us to run full current allowable from all our wells in the Hugoton Field. Our purchases have been according to my interpretation of the Supreme Court decision to the Republic "A" Contract and in accordance with the ratable take provisions of the balance of the contracts.

Cross examination.

By Mr. Alfred Holl (Attorney for Cities Service Oil Company):

Q. Again referring to your Exhibit No. 7, tell us from examination of that when the two lines on that exhibit actually meet, or you mentioned that they crossed numerous instances—tell us when was the last time they met actually?

A. The first half of 1955.

Q. Then, now, going back further to the only time that in looking at it I can see that it actually crossed and extended to the dark lines side, lines extended and actually crossed, and extended above was way back in 1949, isn't that correct? Excuse me, the first part of '50?

A. Well, that is one of the points. However, if you look at late '52, all of '53, all of '54, the first half of '55, you will find that the lines are so close on the graph it is dif-
[fol. 58] ficult to tell which one is above and which one is below. They may cross several times in there.

Q. All right. Now, then, in order for wells to get back and balance with each other, couldn't we assume that those lines have to cross on occasion and one make up what they were behind in the times they did cross?

A. At the time the lines crossed, the two groups of wells would have produced proportionately to that date; does that answer your question, sir?

Q. Wouldn't they have to cross and extend each direction a little bit for them to make up either overage or underage?

A. No. When they meet, both groups are then at the same ratio and are in a ratable position. I don't interpret the exhibit to be such.

Q. I understood this to be current production in proportion to allowables then in effect?

A. Well, the exhibit is the ratio of cumulative status to the preceding January term, so it is cumulative at all times.

* * * * * * *

Q. Briefly, the dotted line, this dealing with cancellation currently—the dotted line here indicates no cancellations, as I understand, because there have been none on that group?

A. That is correct.

Q. Not in recent years, you are talking about I presume from about '55 through '59?

A. Correct. There have been no cancellations, certainly none of any importance.

[fol. 59] Q. Now, then, so we are straight, the solid line since the latter part of '58 does show cancellation, is that correct?

A. The line does not show cancellations. But as we have previously explained here, cancellations are occurring in the Commission's schedules as issued. I want to repeat that matter is at issue in the Supreme Court at this time.

Q. If the amount cancelled were included in there, that line would be more sharply steep, is that correct?

A. Yes. Cancellations commenced to occur on the schedules as issued in about November of 1958.

Q. Now, you testified, I believe, that there were 144 wells in the Republic "A" group?

A. The June schedule issued by the Commission shows 144 wells. One of those wells, I understand, either has or will shortly be plugged, and a replacement well has been drilled. Actually there are 143 wells, although the schedule shows 144.

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Commissioner Byrd: Could I ask a question, Mr. Holl, just pursuing—

Mr. Stucky: I would just take a minute.

Commissioner Byrd: I have heard your brief legal arguments. I want to ask Mr. Fowler one question along the line Mr. Holl was asking. I think you testified to this, but so that I am clear in my mind. On Exhibit 7 your solid line reflects the status of the other wells disregarding cancellations that have been made, is that correct?

A. That is correct.

Commissioner Byrd: Now, one other question. You stated regarding the litigation that is now before the Supreme Court as to the allowables which would affect this [fol. 60] black line and also affect the dotted line, have you made calculations as to what the relative position of these two lines would be if you win those cases?

A. I don't have any precise calculation on it. Do you? The schedules would have to be completely recomputed from May '56 forward.

Commissioner Byrd: Do you have an opinion as to whether or not the status of the two lines would be brought closer together on the graph or be wider apart as they are presently?

A. They would be closer together, because the allowables would be less, and the underproduction would be accordingly less.

Commissioner Byrd: Wouldn't your "A" group wells extend considerably above your zero line?

A. Yes, it would be, above the zero line, but it would not move as far above the zero line as the solid line moved toward the zero line. It would come closer together.

Commissioner Byrd: But the dotted line would be considerable above the zero line, and the solid line below the zero line, is that correct?

A. Yes, sir.

Commissioner Byrd: One other question. At any time depicted by this graph, Exhibit 7, have your Republic "A" wells been overproduced to a point where they had to be shut in?

A. Yes, in July of 1947 the Commission issued an order shutting in some 80 wells of Republic's.

Commissioner Byrd: Was that prior to the Supreme Court's decision that you referred to frequently in your testimony?

[fol. 61] A. Yes, sir.

Commissioner Byrd: You may not know the answer to this; if you don't, just state so. Do you know what happens to your obligations under Republic "A" contract when your allowable on your "A" wells will not let you produce what you are obligated to produce in your Republic "A" contract? You are obligated under that contract to take a certain per cent of the Omaha market?

A. Yes, sir.

Mr. Adams: Only as allowables permit.

Commissioner Byrd: You don't have to take 40 per cent if the allowable doesn't equal 40 per cent?

Mr. Adams: That is correct. The Supreme Court decision bears on that.

Mr. Jones: Mr. Adams' statement was his interpretation.

Commissioner Byrd: Referring to your Exhibit 7 then, and referring to the Kansas Statutes 55-703, and also our rules, which in effect adopt that statute as a rule, which in the statute and the rules say that a producer may produce only such portion of all natural gas that may be currently produced without waste and to satisfy the market demands as will permit each developed lease to ultimately produce approximately the amount of gas underlying such lease and currently produce proportionately with other said leases in said common source of supply. Now, do you have an opinion whether or not the wells depicted by the solid line on Exhibit 7 are currently producing proportionately to the wells depicted by your broken line?

A. I think we should remember that the Hugoton Field of Kansas is a field that is probably going to be produced [fol. 62] over a period of about 70 years. I think the word "currently" should be broadly interpreted, and we should not be concerned over a year or two's time.

Chairman Wiles: Is that another 70 years?

Mr. Adams: I hope not.

Commissioner Byrd: Your answer to my question would be, yes, you think they are currently producing proportionately with other leases?

A. I think so. We will pull those lines back together, we feel, with a little more time.

Commissioner Byrd: If I remember your evidence in the proceedings in C-164, you are talking about two and a half, three and a half, and four years?

A. I believe it was the end of 1961.

Commissioner Byrd: That would be two years, two and a half years?

A. Right.

Commissioner Byrd: And your definition of currently is two and a half years.

A. It might be considered to be longer than that. I think it would depend on the circumstances.

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Cross examination.

By Mr. Charles McDermott (One of the Attorneys for Colorado Oil and Gas Corporation):

Q. * * * Is it not true that orders of, for instance, both this body and the Federal Power Commission have had the effect upon the say, the prices and the take provisions—I won't ask you what effect—but they have had an effect?

[fol. 63] *A. Certainly the Federal Power Commission has had its effect.

Q. So, it is not really an unusual thing in your experience to find provisions contained in one of your contracts or many of your contracts have been altered in some respect by a regulatory authority, is that correct?

A. I won't say it was unusual. I understand a valid order of a regulatory authority can supersede.

Testimony of R. T. Widney (Witness for Cities Service Oil Company).

Examination by Mr. Holl:

I am a petroleum engineer employed by Cities Service Oil Company as superintendent of its gas operations. I have conducted studies and prepared exhibits which I deem pertinent to this particular matter. Exhibit number 8 was identified as a tabulation showing analysis of percent of current allowable produced in the Kansas Hugoton Field by wells connected to Northern Natural Gas Company. This exhibit shows that in July, 1957, 80.33 percent of the current allowable was produced from the Cities Service Oil Company wells, while 109.06 percent of the current allowables were produced that month from the Republic "A" wells; that if all the wells in that particular month had been produced ratably each one of them should have been produced at the rate of about 70.33 per cent of their current allowable. Exhibit number 9 was then identified as a graph reflecting the detail on exhibit 8 and showing the percent of production by groups of wells, the Republic "A" wells as a group, Cities Service Oil Company wells

[fol. 64] as a group, and the balance of the wells connected to Northern's system as a group.

"Mr. Stucky: May I ask a clarifying question while we are between exhibits? Mr. Widney, is there any correlation when you compare the exhibits with Northern's exhibit 7 in any way?

A. I have not compared them. However, they would be comparable, with the exception that we have—if you would add Cities Service Oil Company wells and the balance of Northern Natural Gas Company wells, it would compare with the solid line of Exhibit 7 in this instance, the Northern Natural Gas Company. Although I have not made an exact comparison, it would be the same."

Exhibit number 10 was then identified as an analysis of the status of overage and underage of the wells connected to Northern Natural Gas Company in the Kansas Hugoton Field, dividing such wells into three groups (as was done in Exhibit 9) plus a total of all the wells connected to Northern in said field for the fourth group of wells. This exhibit reflected disproportionate purchases by Northern in January, 1959, with substantial preference being given to the Republic "A" group wells.

Exhibit number 11 was then identified as a graph representing the information contained in Exhibit 10.

Exhibit number 12 was then identified, it having been prepared to show the effect of drainage of offset wells in the Hugoton Field. It reflected the history of well "A" drilled in 1946 and the history of well "B" drilled five and a half years later on an adjoining governmental section. During the five and one half years referred to the pressure [fol. 65] dropped between the two wells locations was about 42 pounds.

Exhibit number 13 was then identified as a graphical representation of the data contained in Exhibit 12.

Q. You have said what effect the drilling of additional wells is on it. Are you implying from that that overproduction on one well and underproduction on another will have the same effect?

A. It will have the same effect. This might be a little more marked. It will have the same effect given a sufficient length of time.

Q. Your next two exhibits, as I understand, you have picked two other wells on which a comparison has been made, is that correct?

A. That is correct.

Exhibits numbered 14 and 15 were then identified to show the pressure drop between well "C" and well "D" which were offset wells but where well "C" was drilled some five years before well "D" was drilled.

Exhibit number 16 has been identified as being prepared to show the theoretical effect of production on drainage areas on wells in the Kansas Hugoton Field.

Exhibits numbered 8 through 16 were then offered in evidence.

Chairman Wiles: Are there any objections?

Mr. Adams: Just a moment, if the Commission please. We would like to object to Exhibits 12, 13, 14 and 15 for the reason that I think the Commission will take judicial notice that there are approximately 4,000 wells in the [fol. 66] Hugoton Field, and you could take almost anyone that knows anything about the gas business knows you could take two wells somewhere in that field and prove most anything. We don't believe under the circumstances that any exhibit drawn on two wells in that field is properly illustrative or could form a basis for any fair conclusion. As a consequence, we do not regard these exhibits as proper exhibits and ask they not be admitted.

Mr. Holl: I fail to see why that is a valid reason for objecting to the introduction of the exhibits. The witness has testified they are studies of wells in the Hugoton Gas Field and has explained them, and I think they have the proper foundation.

Commissioner Beatty: I would like to ask this witness a question along the same line. Mr. Widney, as Mr. Adams pointed out, these are just four wells out of 4,000?

A. That is right.

Commissioner Beatty: With such variations over the field, are you willing to go ahead and say that this is typical or representative of more than just those four wells?

A. The reason for the exhibits was to show that drainage does occur. We selected these particular wells, because there had been offset by production, and we thought it would most ably show that drainage can and does occur. I do not think it is representative of the 4,000 in the Hugoton Field. These are specialized instances only to illustrate a point.

Chairman Wiles: You are not contending then that they are representative of other wells?

A. I am not contending they are representative of all of the wells, no. All I am trying to illustrate here is that [fol. 67] drainage can occur in the Hugoton Field, as shown by actual experience.

Commissioner Beatty: Do you go further and say that when Well No. 2 is drilled as a general rule it will have some similar effect of neighboring Well No. 1?

A. Yes, it would. If Well No. 1 had been drilled prior, then it will have some effect.

Chairman Wiles: The Commission feels, Mr. Adams, that these four exhibits are admissible for what they attempt to prove as clarified by the witness. Exhibits 8 through 16 will be admitted.

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A. We have 210 wells in the Kansas Hugoton section of Northern Natural. Of the 210 wells we have a block of 59 wells in Morton County, Kansas. Now, the wells are blocked in a group and are offsetting in close proximity to the Republic "A" wells. Two wells, I believe, are direct offsets. The other wells are within the boundary of a block of wells, within two to three maybe four miles probably from the farthest well to the closest Republic "A" well.

Mr. Adams: Would it be in the neighborhood of say seven or eight miles?

A. Now that is an estimate from what I remember on the map at this time.

• • • • • • •

Q. Now, you have discussed the status of this field at this time and particularly with regard to the connections of Northern Natural, and I believe have expressed your opinion that there is drainage occurring, would you care [fol. 68] to offer for the Commission a recommendation or solution for this particular problem?

A. Well, there are two solutions. Number one, from our studies they indicate that if the wells are produced with the same per cent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected. There are two ways of accomplishing this currently in the Hugoton Field. One is to raise the total Northern Natural's takes up until they are ratable with the Republic "A" group, and second would be to lower Republic "A" by curtailing their production, so they will become ratable with the balance of the field.

Q. In other words, you are saying you wouldn't be so concerned about underproduction if all the wells were underproduced at the same rate?

A. That is right.

Q. In other words, if they are underproduced at the current rate, if you go ahead and allow the wells that are currently greatly curtailed in underproduction to produce more gas than other wells to be curtailed currently that are relatively overproduced, then compensatory drainage will take place?

A. Yes, and the correlative rights of all the wells will be protected.

Cross examination.

By Mr. Adams:

Referring to Exhibit 12 the well "A" and the well "B" used in that exhibit are each located in Texas County, Oklahoma, where Cities Service Oil Company has 199 wells. In addition to the company's wells in Texas County, Okla- [fol. 69] homa, it has approximately 357 gas wells in the Kansas Hugoton Field. Referring to exhibit 15, Well "C" used in such exhibit is a Republic "A" well and Well "D" is a Cities Service Oil Company well. These two wells

are located in Morton County, Kansas. These two wells "C" and "D" are in the same governmental section, and are, therefore, less than a half mile apart. Wells "A" and "B" used in illustration in Exhibit 12 located in Oklahoma are a mile apart.

I am familiar with the gas purchase contracts and the provisions dealing with ratable taking therein with the exception of the Republic "A" group of wells from such ratable provision.

Cross examination.

By Mr. Richard Jones (Attorney for Republic Natural Gas Company):

In expressing recommendations to the Commission in this matter if the purchases from Republic "A" group of wells were curtailed and the volume of gas which would otherwise be purchased from such wells were purchased from the other wells connected to Northern until the end of 1961, the other wells would not suffer cancellation of allowables, which may otherwise be experienced. For Northern to increase its purchases from the Field is not the only practical solution.

Testimony of Mr. Lester Wilkonson in Behalf of Northern Pump Company.

Direct examination.

By Mr. Ferd Evans (Attorney for Northern Pump Company):

I am a consulting petroleum engineer employed by Northern Pump Company. Exhibit number 17 sponsored by the [fol. 70] witness was prepared to reflect the various groups of gas wells connected to Northern's system in the Kansas Hugoton Field showing comparable status of underproduction. This exhibit showed that all of the wells connected to Northern with the exception of the Republic "A" group were substantially underproduced. Exhibit number 18 was

identified showing the runs from the respective wells by groups connected to Northern's system in the month of June, 1959. This exhibit shows that during such month the Republic "A" wells were overproduced by 25% of the June current allowable and all other wells connected to Northern were underproduced 89.4% of their current allowable; that the Republic "A" group wells represented 19% of the connected deliverability to Northern and receive 73% of the gas which it purchased during June, while the other wells connected to Northern's system representing 81% of its connected deliverability received only 27% of the gas which Northern purchased in June, 1959. The conclusion drawn from Exhibit 17 is that had Northern taken ratably from all the wells connected to its system in the Kansas Hugoton Field to date there would have been no cancellation of underages to May 31 (1959) because the wells were only 5.7 January underproduced. Exhibits 17 and 18 were admitted in evidence.

Chairman Wiles: The record is closed and the matter will be taken under advisement by the Commission.

[fol. 71]

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Docket No. 60,740-C (C-7216)

Conservation Division

IN THE MATTER OF NORTHERN NATURAL GAS COMPANY
TO SHOW CAUSE.

ORDER—October 7, 1959

Now on this 7th day of October, 1959, the above-entitled matter comes before the Commission for further consideration and final disposition. The Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners), having examined the record, exhibits, files

and briefs of counsel, and being fully advised in the premises, finds:

1. That Northern Natural Gas Company is not taking ratably from its connections in the Kansas Hugoton Gas Field which is a common source of supply.

2. That Northern Natural Gas Company purchases part of its gas from Republic Natural Gas Company under a contract which shall be designated as the "Republic A" contract. That this "Republic A" contract requires Northern Natural Gas Company to take certain quantities of gas or pay for it even if not taken. That this "Republic A" contract has a further provision making it subject to all valid legislation and all valid orders, rules, and regulations of duly constituted authorities having jurisdiction.

3. That the wells dedicated by Republic Natural Gas Company to the fulfillment of this "Republic A" contract have been produced at a much greater rate (percentage of [fol. 72] allowables) than other wells connected to the Northern Natural Gas Company system. That the disparity in rates of production has been so great that many wells have accumulated sizeable underages while the wells producing under the "Republic A" contract are producing the current allowable and some are overproduced. That this is not ratable taking from a common source of supply.

4. That under the Gas Conservation Laws of the State of Kansas, G.S. 1949, 55-703, the Commission is given the duty and power to "so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. • • • " This is also reflected in the Basic Order for the Hugoton Field.

5. That the right to enter into private contracts can not be used as a means to circumvent lawful orders of the Commission or valid laws passed by the Legislature. Therefore the fact that Northern Natural Gas Company may be contractually bound to take a certain quantity of gas from certain wells is not binding on the Commission in its duty to regulate the production of gas from the entire field.

6. That Northern Natural Gas Company should be ordered to take gas ratably from its connections in the Kansas Hugoton Gas Field.

It Is, Therefore, by the Commission Ordered: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field.

[fol. 73] The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

By the Commission It Is So Ordered.

Raymond B. Harvey, Secretary.

(Seal)

While the aforementioned Order was dated October 7, 1959, it was not issued or delivered to Northern Natural Gas Company until October 29, 1959. Thereafter, and on November 6, 1959, Northern Natural Gas Company timely filed with the Commission petition for rehearing, which without formal parts is as follows:

PETITION FOR REHEARING—Filed November 6, 1959

Comes Now Northern Natural Gas Company, a corporation, petitioner, and hereby petitions this Commission for an order setting aside and granting a rehearing in the above captioned proceeding with respect to Commission's "Order" dated October 7, 1959, and in support thereof shows:

1. That Petitioner is a corporation, organized under the laws of the State of Delaware, with its principal office at Omaha, Nebraska, and duly licensed to transact business in the State of Kansas; that it is now and has been during all times material herein engaged generally in the business of purchasing natural gas for transportation by means of pipe line system and facilities extending from Texas into and through Oklahoma and Kansas and into [fol. 74] Nebraska, Iowa, Minnesota and South Dakota; that

in such operation, and as an integral part thereof, petitioner has, among other things, entered into about 125 contracts with certain producers in Finney County, Kansas, and other counties in the Kansas Hugoton Gas Field under which (a) the recoverable gas under the lease acreage covered by said contracts was and is dedicated to be sold to Northern Natural Gas Company, and (b) express provisions are included in all such contracts which prescribe a certain method of apportionment amongst all such producers of Northern's requirements for gas from the said field; that petitioner is a natural gas company as defined in the Natural Gas Act, as amended (15 U. S. C. A. 717, *et seq.*), and is engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for domestic, commercial, industrial and other uses. Virtually all of the sales of natural gas to Northern in the Kansas Hugoton Gas Field are sales in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial and other uses and as such are subject to the provisions of said Natural Gas Act and to the jurisdiction of the Federal Power Commission thereunder. Petitioner is an interested party in captioned proceedings, its substantial gas reserves in the Kansas Hugoton Gas Field and contract rights with respect thereto being affected by the herein complained of order, such gas reserves dedicated for sale to petitioner being necessary and essential to petitioner's pipe line operation for the interstate transmission of gas for sale in interstate commerce for resale.

[fol. 75] 2. That the "Order" complained of, while dated October 7, 1959, was not issued or delivered to petitioner until October 29, 1959.

3. That said "Order" is unlawful, illegal, unconstitutional, beyond the jurisdiction of the Commission and void, in that:

(a) The findings therein are contrary to the evidence, are not supported by any competent evidence and are wholly unauthorized, unfounded and unwarranted, either under the evidence or under the Stat-

utes of Kansas, relating to "production and conservation of natural gas", Sections 55-701, *et seq.*, G.S. of Kansas, 1949, as amended.

(b) It is contrary to and in direct conflict with said Commission's Basic Proration Order, as amended, for the Kansas Hugoton Gas Field promulgated and adopted by said Commission March 21, 1944, in Docket C-164 initially effective March 21, 1944.

(c) It is arbitrary, capricious and discriminatory as to petitioner, is an unreasonable abuse of administrative authority on the part of the Commission, and is contrary to and beyond the scope of powers granted the Commission by any statute.

(d) It purports to amend said Commission's Basic Proration Order for the Hugoton Gas Field insofar only as it affects one (Northern Natural Gas Company) of the seven principal purchasers of gas therein and in a proceeding not noticed to any party as being a proceeding for the amendment of said Basic Proration Order all in violation of the due process clause of the Constitution of the United States.

[fol. 76] (e) It is so vague and indefinite as to what it purports to establish as ratable taking as to be impossible of reasonable interpretation or proper administration; it is the making of a rule as the occasion arises, which certainly is not a guide for anyone; it amounts to rule by man rather than rule by law and is lacking in due process of law.

(f) It purports to strike down and amend the express provisions in all of petitioner's gas purchase contracts in the Kansas Hugoton Gas Field by which all producers selling gas to petitioner have agreed to the apportionment of Northern's gas requirements amongst them, thereby (a) casting an unlawful burden upon, impairing and impeding the interstate operations of petitioner in the purchase, transportation and sale in interstate commerce of natural gas for resale taken by petitioner from said

Kansas Hugoton Gas Field in violation of the commerce clause of the United States, (b) in impairment of and contrary to the exclusive jurisdiction of the Federal Power Commission under the subsisting provisions of the Natural Gas Act, 15 U.S.C.A. 717, *et seq.*, and (c) in impairment of the obligations of such gas purchase contracts in violation of Section 10 of Article I of the Constitution of the United States.

(g) It destroys and takes petitioner's contract and property rights without compensation, denies petitioner equal protection of the law and abridges petitioner's privileges and immunities in contravention and in violation of Sec. 17, Art. 2 of the Constitution of the State of Kansas, and the Fourteenth Amendment to the Constitution of the United States.

[fol. 77] (h) Unless rehearing is granted herein as prayed for, petitioner shall assume that it is the meaning and intent of Commission's "Order" dated October 7, 1959, that the provisions of all of petitioner's gas purchase contracts in the Kansas Hugoton Gas Field which provide for a method of purchases and receipts of gas which in operative effect are contrary to or vary from "ratable taking" as determined by the Commission, are invalid and void as against public policy, including any such provisions which purport to require purchases and receipts of gas at rates and in amounts greater than required by such "ratable taking", as well as any such provisions which purport to permit purchases and receipts of gas at rates and in amounts less than required by such "ratable taking".

Wherefore, and by reason of the foregoing, petitioner prays that its Petition for Rehearing be granted and that upon such rehearing said "Order" be set aside and appropriate order entered in accordance with the evidence presented and the applicable law.

COMMISSION ORDER DENYING PETITION FOR REHEARING
November 10, 1959

Now on this 10th day of November, 1959, the above-entitled matter comes before the Commission for further consideration on the petition for rehearing filed herein November 6, 1959, by Northern Natural Gas Company with respect to the Commission order issued herein dated October [fol. 78] 7, 1959. The Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) having re-examined its files and records herein, and being advised in the premises, finds:

1. That the Commission order above-referred to issued herein on October 7, 1959, was a valid exercise of its authority under G.S. 1949, Chapter 55, Article 7, as amended.

2. That the petition for rehearing filed herein presents no new matter for Commission consideration; that said petition for rehearing is without merit and should be denied.

It Is, Therefore, by the Commission Ordered: That the petition for rehearing filed herein by Northern Natural Gas Company be and it is hereby denied.

By the Commission It Is So Ordered.

Wiles, Chm.; Beatty, Com.; Byrd, Com.

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS

PETITION FOR JUDICIAL REVIEW—Filed December 8, 1959

Case No. 10740

Comes Now the Petitioner, Northern Natural Gas Company, and for its petition for judicial review herein against [fol. 79] the action of the above named Respondent, alleges and shows to the Court as follows:

1. That Petitioner is a corporation, organized under the laws of the State of Delaware, with its principal office at Omaha, Nebraska, and duly licensed to transact business in the State of Kansas; that it is now and has been during all times material herein engaged generally in the business

of purchasing natural gas for transportation by means of pipe line system and facilities extending from Texas into and through Oklahoma and Kansas and into Nebraska, Iowa, Minnesota and South Dakota; that in such operation, and as an integral part thereof, petitioner has, among other things, entered into about 125 contracts with certain producers in Finney County, Kansas, and other Kansas counties within the confines of the Kansas Hugoton Gas Field, which contracts are presently subsisting and have subsisted during all times material herein, for the purchase of natural gas produced in and from said field, and under which contracts (a) the recoverable gas under the lease acreage covered by said contracts was and is dedicated to be sold to Northern Natural Gas Company, and (b) express provisions are included in all such contracts which prescribe a certain method of apportionment amongst all such producers of Northern's requirements for gas from the said field; that petitioner is a natural gas company as defined in the Natural Gas Act, as amended (15 U.S.C.A. 717, *et seq.*) and is engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for domestic, commercial, industrial and other uses. That such sales of natural gas are [fol. 80] sales in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial and other uses and as such are subject to the provisions of said Natural Gas Act and to the jurisdiction of the Federal Power Commission thereunder. Petitioner is an interested party in captioned proceeding, its substantial gas reserves in the Kansas Hugoton Gas Field and contract rights with respect thereto being affected by the herein complained of order, such gas reserves dedicated for sale to petitioner being necessary and essential to petitioner's pipe line operation for the interstate transmission of gas for sale in interstate commerce for resale.

2. That Respondent, the State Corporation Commission of the State of Kansas, is an administrative body, created by legislative enactment, with its principal place of business and post office address at State Office Building, Topeka, Kansas, but the Conservation Division thereof

having its place of business and address at 500 Insurance Building, Wichita, Kansas; that Harry G. Wiles is Chairman of said Commission and Marion Beatty and Richard C. Byrd are members of said Commission.

3. That this is an action under G.S. 1949, 55-707, for a judicial review of proceedings before the State Corporation Commission of the State of Kansas in its Docket No. 60,740-C (C-7216) wherein it issued its "Order" dated October 7, 1959. That a full and complete transcript of the proceedings had in said docket, together with all exhibits therein introduced and attached thereto, is being filed in this court and are made a part hereof to the same extent as though set out verbatim. That a copy of said [fol. 81] "Order" dated October 7, 1959, is marked Exhibit "A", attached hereto and made a part hereof. That upon issuance of said "Order" dated October 7, 1959, petitioner timely filed with Respondent a Petition for Rehearing, a true copy of which, without proof of service, is marked Exhibit "B" attached hereto and made a part hereof. That on November 10, 1959, said Petition for Rehearing was denied by Commission Order, a true copy of which is attached hereto as Exhibit "C" and made a part hereof.

4. That said "Order" dated October 7, 1959, is unlawful, illegal, unconstitutional, beyond the jurisdiction of the Commission and void for each, every and all of the reasons set forth in Petitioner's Petition for Rehearing, Exhibit "B" attached hereto.

5. That such "Order" is so vague, indefinite and uncertain as to leave unanswered necessary questions pertaining to its applicability and effect upon provisions in Petitioner's gas purchase contracts in the Kansas-Hugoton Gas Field which might provide for a method of purchases and receipts of gas at rates and in amounts which, in operative effect, may be contrary to or vary from "ratable taking" as determined by the Commission, including any such provisions which purport to require purchases and receipt of gas at rates and in amounts greater than required by such "ratable taking" as well as any such provisions which

purport to permit purchases and receipt of gas at rates and in amounts less than required by such "ratable taking".

6. That for all the reasons hereinabove stated and alleged, Petitioner respectfully asks said Court at this time [fol. 82] to grant a stay of execution of the "Order" dated October 7, 1959.

Wherefore, Petitioner prays:

(a) That this Court grant instanter a stay of execution of enforcement of the "Order" dated October 7, 1959;

(b) That this Court enter judgment herein setting aside said "Order" dated October 7, 1959, for the reasons that it is unreasonable, arbitrary, unlawful, beyond the jurisdiction of the Commission and void; and

(c) That Petitioner be granted all other relief to which Petitioner may be entitled hereunder.

The instruments which were exhibits to such Petition for Judicial Review are as follows:

Exhibit "A" was Commission's order of October 7, 1959, which is set forth in full Abstract pages 68-70.

Exhibit "B" attached to such Petition for Judicial Review was the Petition of Northern Natural Gas Company for rehearing which is heretofore set forth in full Abstract pages 70-74.

Exhibit "C" attached to said Petition for Judicial Review was Commission's Order denying Petition for Rehearing which is heretofore set forth in full Abstract pages 74-75.

[fol. 83]

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS

No. 10740

NORTHERN NATURAL GAS COMPANY, Petitioner,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, HARRY G. WILES, Chairman, MARION BEATTY and RICHARD C. BYRD, as Members of said Commission and their respective successors in office, Respondent.

MOTION TO DISMISS—Filed February 9, 1960

Comes now the respondent, State Corporation Commission, and moves the Court for an order dismissing the Petition for Judicial Review filed herein by Northern Natural Gas Company, and in support thereof states:

1. That the State Corporation Commission by its order of October 7, 1959, entered in Docket No. 60,740-C (C-7216), directed Northern Natural Gas Company to take natural gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field. That said order is attached to the aforementioned Petition for Judicial Review as Exhibit "A"; and that said order constitutes the sole subject matter of said Petition for Judicial Review.

2. That by its order of February 8, 1960, entered in the said Docket No. 60,740-C (C-7216), a true copy of [fol. 84] which is attached hereto as Exhibit "A", the State Corporation Commission has rescinded in full the said previous order of October 7, 1959.

3. That as a result of said order of February 8, 1960, the previous order of October 7, 1959, is no longer of any force or effect and that the subject matter of the Petition for Judicial Review no longer exists and the question presented therein is now moot.

Respectfully submitted,

State Corporation Commission of the State of Kansas, By Its Attorney, J. Robert Wilson, General Counsel.

EXHIBIT "A" TO MOTION TO DISMISS

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Docket No. 60,740-C (C-7216)

Conservation Division.

In the Matter of NORTHERN NATURAL GAS COMPANY to Show Cause

ORDER

Now on this 8th day of February, 1960, the above-entitled matter comes on for further consideration and determination by the State Corporation Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) hereinafter referred to as the Commission, upon its own motion; and the Commission, having [fol. 85] examined the files and records, and being thereby fully advised in the premises, finds:

1. That the Commission, upon its own motion, by order of May 27, 1959, undertook to investigate the matter of ratable production of natural gas by the Northern Natural Gas Company from its wells located in the Kansas Hugoton Gas Field. A full investigation and hearing was conducted before the Commission on July 24, 1959. That as a result of such hearing and investigation the Commission found that Northern Natural Gas Company was not taking natural gas ratably from the Kansas Hugoton Gas Field; whereupon the Commission entered its order of October 7, 1959, directing the said Northern Natural Gas Company to take natural gas ratably from the Kansas Hugoton Gas Field.

2. That the Commission, of its own motion, by order of November 12, 1959, entered into an investigation for the purpose of promulgating a statewide rule requiring all producers to take natural gas ratably from all wells within a common source of supply to which they are connected. Whereupon, hearings in said matter were conducted before the Commission on December 17, 1959, and

January 21, 1960, in Docket No. 34,780-C (C-1825); and as a result thereof, the Commission determined that the provisions of G.S. 1949, 55-703, imposed a duty upon the Commission to promulgate such a rule, and by order of February 3, 1960, the Commission thereupon promulgated Rule 82-2-219 requiring all producers to take natural gas ratably from all wells within a common source of supply to which they are connected.

[fol. 86] 3. That Rule 82-2-219 became effective February 8, 1960, and being statewide in application, was filed with the Revisor of Statutes on February 8, 1960, and is thereby applicable to Northern Natural Gas Company and all other companies similarly situated. That the said Rule 82-2-219, being now in full force and effect, accomplishes the same purpose as the Commission's order of October 7, 1959, entered in this docket; and as a result thereof, said order is no longer necessary and should be rescinded in full.

It Is, Therefore, by the Commission Ordered: That the Commission's order of October 7, 1959, entered in this docket be, and it is hereby rescinded in full.

By the Commission It Is So Ordered.

Raymond B. Harvey, Secretary.

(Seal)

SFF:fr

Affidavit of Service (omitted in printing).

[fol. 87]

Order Denying Motion to Dismiss—February 23, 1960

Now on this 23rd day of February, 1960, comes on for hearing motion of respondent, The State Corporation Commission, for an order dismissing the petition for judicial review filed herein by Northern Natural Gas Company; respondent, The State Corporation Commission, appearing by its counsel of record and petitioner Northern Natural Gas Company, appearing by its counsel of record.

[fol. 88] Thereupon, the Court having listened to arguments and statements of counsel, and having reviewed the

Court file, and being duly advised in the premises, finds that by its order of February 8, 1960, The State Corporation Commission has rescinded its previous order of October 7, 1959, which is the subject matter of the said petition for judicial review. The Court further finds, however, that such order of The State Corporation Commission dated February 8, does not have retroactive effect, and that the order dated October 7, 1959, in this cause, was in effect from October 7, 1959, to February 8, 1960. The Court further finds that such motion to dismiss filed herein by respondent, The State Corporation Commission, should be and the same is hereby denied.

It Is So Ordered.

JOURNAL ENTRY OF JUDGMENT—April 8, 1960

Now on this 8th day of April, 1960, there comes on for consideration and determination by the Court; the petition of Northern Natural Gas Company for Judicial Review of the October 7, 1959, Order of the State Corporation Commission directing the petitioner to take gas ratably from the Kansas Hugoton Gas Field. The petitioner ap-
[fol. 89] pears by its attorneys of record, and the respondent, State Corporation Commission, appears by its attorneys of record.

Whereupon, the Court, having examined the files and records herein, and having heard the argument of counsel on March 15, 1960, finds that the said order of the State Corporation Commission, dated October 7, 1959, directing petitioner to take gas ratably from the Kansas Hugoton Gas Field is lawful, valid, and reasonable, and should be affirmed.

It Is, Therefore, by the Court Considered, Adjudged and Ordered: That the October 7, 1959, Order of the State Corporation Commission directing Northern Natural Gas Company to take gas ratably from the Kansas Hugoton Gas Field is affirmed.

By the Court,

Roland H. Tate, Judge.

MOTION FOR NEW TRIAL—Filed April 11, 1960

Comes now Northern Natural Gas Company and moves the court for an order vacating the judgment previously entered herein and granting a new trial in the above entitled cause for the following reasons:

1. Because of abuse of discretion of the court.

[fol. 90] 2. Because of accident and surprise which ordinary prudence could not have guarded against.

3. Because this petitioner was not afforded a reasonable opportunity to present its evidence and be heard on the merits of the case.

4. Because of erroneous rulings of the court.

5. Because the judgment and decision is in whole or in part contrary to the evidence.

6. Because of newly discovered evidence which petitioner could not with reasonable diligence have discovered and produced at the trial.

7. Because the judgment and decision of the court was procured by the corruption of the party obtaining it.

By all of which the rights of the petitioner herein, Northern Natural Gas Company, were substantially affected.

ORDER OVERRULING MOTION FOR NEW TRIAL—April 27, 1960

Now on this 27th day of April, 1960, the above entitled matter comes on for hearing on the motion of the petitioner Northern Natural Gas Company for a new trial herein. The parties appear by their attorneys of record.

Thereupon the court considers the pleadings filed herein, hears arguments of counsel and being otherwise fully ad-
[fol. 91] vised in the premises finds that petitioner's motion for new trial herein should be overruled.

It Is, Therefore, by the Court Considered, Ordered, Adjudged and Decreed that the motion for new trial filed herein by Petitioner Northern Natural Gas Company be and the same is hereby overruled.

NOTICE OF APPEAL—Filed May 6, 1960

To: The State Corporation Commission of the State of Kansas, and J. Robert Wilson, General Counsel, and S. F. Fleeker, Assistant General Counsel, its attorneys of record.

You and each of you please take notice that the above named petitioner, Northern Natural Gas Company, has appealed and does hereby appeal to the Supreme Court of the State of Kansas, from the judgment and decision, and every part thereof, of the District Court of Finney County, Kansas, made herein and entered on April 8, 1960, and does further appeal to said Supreme Court from the order of said District Court, denying and overruling said petitioner's motion for new trial, made herein and entered on April 27, 1960, in said above entitled action.

———

[fol. 92]

SPECIFICATIONS OF ERROR

I.

The trial Court erred in its judgment affirming the Order of the State Corporation Commission dated October 7, 1959, in that:

(a) Said Order and each of the findings of fact therein purporting to be in support thereof are unauthorized by and contrary to the valid subsisting provisions of the Statutes (particularly 55-703, G.S. 1949 as amended) dealing with the production and conservation of natural gas, the Basic Proration Order for the Kansas Hugoton Gas Field and the statewide gas conservation Rules and Regulations of the Commission.

(b) Such Order is not supported by substantial, competent, relevant and material evidence, but is contrary thereto.

(c) That said Order is arbitrary, unreasonable and discriminatory, has no relationship to proration or conservation of gas, burdens interstate commerce, and

takes appellant's property and contract rights in property, all in violation of the Federal Constitution, namely the Commerce Clause (Clause Three, Section Eight of Article I) the Contract Clause (Clause One, Section Ten of Article I) and the provisions of the Fourteenth Amendment thereto and the Kansas Bill of Rights, Sections 1, 2 and 18 and Section 17, Article 2 of the Kansas Constitution.

(d) Said Order, together with the Statutes upon which the same is based as construed to authorize such Order, under the evidence as applied to appellant, violate the provisions of the Natural Gas Act (15 [fol. 93] U.S.C.A. 717 *et seq.*) and invades the jurisdiction of the Federal Power Commission thereunder.

[fol. 94]

APPENDIX I

(Exhibit 4)

GAS PURCHASE CONTRACT

DATED DECEMBER 21, 1945

REPUBLIC NATURAL GAS COMPANY

AND

NORTHERN NATURAL GAS COMPANY

[fol. 96]

GAS PURCHASE CONTRACT

This Contract, made and entered into this 21st day of December, 1945, by and between REPUBLIC NATURAL GAS COMPANY, a Delaware corporation, as party of the first part, hereinafter referred to as "Republic" and NORTHERN NATURAL GAS COMPANY, a Delaware corporation, as party of the second part, hereinafter referred to as "Northern";

WITNESSETH: That in consideration of the covenants and agreements hereinafter set forth to be kept and performed by the parties, it is hereby agreed as follows:

ARTICLE I

GAS TO BE PURCHASED AND SOLD

SECTION 1. *Sale and Purchase Commitments.* Subject to the terms and conditions and within the limitations hereinafter set forth, Republic agrees to sell and deliver to Northern and Northern agrees to receive, purchase and pay for natural gas in its natural state produced or purchased by Republic in the "Hugoton Area" which, for the purposes of this contract, is defined to mean lands located in Stevens, Morton and Grant Counties, Kansas, and Texas County, Oklahoma, and Counties in Kansas and Oklahoma immediately adjoining said Stevens, Morton or Grant Counties, Kansas, or Texas County, Oklahoma.

SECTION 2. *Volume to Be Purchased and Sold.* The quantity of gas which Northern agrees to purchase and receive from Republic and Republic agrees to sell and deliver to Northern shall be sixty per centum (60%) of all gas which Northern may take or use, or cause to be taken or used, during the term of this contract, for the require- [fol. 97] ments of Northern for serving from its said pipe line and any extension thereof which Northern may make, all or any portion of that part of the States of Iowa and Nebraska lying North of the 40th parallel of latitude and East of longitude 98 West of Greenwich (herein referred to as the "Omaha District"), which is hereby agreed to mean the total of:

(a) Sixty per centum (60%) of all gas sold by Northern in the Omaha District after adjusting sales pressure basis of measurement to the purchase basis of measurement, viz.: 16.4 pounds per square inch absolute pressure;

(b) Sixty per centum (60%) of all gas used as fuel at Northern's compressor stations located at Beatrice and Palmyra, Nebraska, and Oakland and Ogden,

Iowa, measured on a basis of 16.4 pounds per square inch absolute pressure;

(c) Sixty per centum (60%) of all gas used as fuel at any other compressor station, or stations, except Ventura, which are now or may hereafter be constructed in the Omaha District measured on a basis of 16.4 pounds per square inch absolute pressure; provided, however, that in the event any such compressor station, or stations, shall be operated to compress gas for delivery to markets other than those located in the Omaha District, such 60% shall be reduced in the same proportion that the volume of gas delivered therefrom to markets outside the Omaha District bears to the total volume compressed at said station;

(d) Sixty per centum (60%) of the volumes of lost and unaccounted-for gas measured at 16.4 pounds per [fol. 98] square inch absolute pressure which shall be allocated to the Omaha District on the basis of the ratio of Northern's pipe-line miles of three-inch equivalent within the Omaha District to the pipe-line miles of three-inch equivalent in Northern's total pipe-line system.

SECTION 3. *Annual Minimum and Maximum Volumes.* The aggregate volume of gas to be purchased by Northern and delivered by Republic hereunder during the twelve months' period beginning July 1 of each year shall not be less than 12,500,000,000 nor more than 36,500,000,000 cubic feet.

SECTION 4. *Rate of Delivery.* So far as practicable, and without interruption, Republic shall deliver and Northern shall take gas in accordance with Northern's market demands in the Omaha District, and Northern shall, from time to time, notify Republic of any anticipated substantial increase in such daily requirements; provided, however, that Republic shall never be obligated to deliver more than 100,000,000 cubic feet of gas during any 24-hour period; and provided further that it shall be deemed that Northern

has complied with its obligation to take gas under this Article I if, on the 31st day of December of each year, Northern, so far as practicable, shall have taken during the preceding six months the volumes of gas specified herein, and if on or before June 30 of each year Northern shall have taken during the preceding twelve months the total amount of gas herein required.

[fol. 99]

ARTICLE II

Price and Payment

Section 1. *Initial Price for Gas.* For all natural gas delivered hereunder to and including the 30th day of June, 1951, Northern shall pay Republic six cents (6¢) per thousand cubic feet.

Section 2. *Adjustment of Price for Gas.* For all natural gas delivered hereunder subsequent to June 30, 1951, the price to be paid shall be adjusted every third year as provided in subparagraph (a) and (b) of this Section, but in no event shall said adjusted price be less than six cents (6¢) nor more than ten cents (10¢) per thousand cubic feet.

(a) *By Agreement of Parties.* Not later than June 30 of each third year, beginning with the year 1950, Northern and Republic shall negotiate and agree upon the price to be paid by Northern for gas to be delivered hereunder during the three-year period beginning with July 1 of the following year.

(b) *By Arbitration.* In the event the parties shall fail to agree upon a price by November 1 of any year in which the price is to be adjusted, then the determination of such price for the three-year period, beginning with July 1 of the following year, shall be made by arbitration in the following manner:

(i) Not later than the following November 15, a Board of Arbitration composed of three arbitrators shall be created, one of whom shall be appointed, and his services and expenses paid for,

by Republic, one of whom shall be appointed, and his services and expenses paid for by North-
[fol. 100] ern and the third to be selected by the two appointed as aforesaid, whose services and expenses shall be paid one-half by Republic and one-half by Northern. In the event that the two arbitrators appointed by the parties hereto cannot agree on the selection of the third, then such third arbitrator shall be appointed by the Judge of the District Court of the United States, in and for the District of Kansas. Any award made by a majority of the three arbitrators shall be final, conclusive and binding upon the parties.

(ii) Said Board of Arbitration shall convene at the earliest practicable date after its selection and shall proceed to consider and determine the price which Northern shall pay for gas for the three-year period beginning with July 1 of the following year (which shall not be less than six cents (6¢) nor more than ten cents (10¢) per thousand cubic feet) and make its award within thirty (30) days thereafter, or not later than the following January 1st, whichever is sooner.

(iii) If the Board of Arbitration so selected shall fail to reach an agreement and make an award within the time specified in (ii) above, said board, at the request of either party, shall be discharged and a new board shall immediately be selected in the same manner prescribed in (i) above and proceed in like manner.

(iv) If after either of the parties shall have selected an arbitrator as provided in (i) above and the other party shall fail to do so, within 30 days after notice of selection, then the single arbitrator so selected may proceed to individually
[fol. 101] determine the price in the same manner and with the same force and effect as if the same had been determined by a complete Board.

SECTION 3. *Price for Gas Delivered During Period of Delay in Adjustment.* If for any reason the determination of the price of gas as provided in Section 2 of this Article shall be delayed beyond the date when such new price would otherwise become effective, Republic shall continue to deliver and Northern shall continue to receive and pay for gas at the price effective during the preceding period, provided, however, that the new price, when finally determined, shall be applied retroactively to all gas delivered from the beginning of the period for which it is to be effective and adjustment made accordingly.

SECTION 4. *Payment for Gas.* On or before the tenth day of each calendar month Republic shall render Northern a statement of the daily volumes of gas delivered hereunder by Republic during the preceding calendar month and shall accompany said statement with supporting meter charts which shall be returned to Republic after examination. Northern agrees to make payment on or before the 25th day of each month for all gas delivered hereunder during the preceding month.

SECTION 5. *Penalty for Failure to Take.* If, in any year ending June 30 during the term of this agreement, Northern shall fail to take the annual volume of gas as provided in this agreement, then within twenty-five (25) days after the end of such year Northern shall pay Republic (at the price in effect hereunder for gas delivered during such year) for the difference between said volume [fol. 102] actually taken and the volume of gas which Northern should have taken during said year.

SECTION 6. *Penalty for Failure to Make Prompt Payment.* If at any time Northern shall fail to pay any amount due to Republic for gas delivered hereunder when the same is due, unless in good faith contested, interest thereon shall accrue at the rate of six per centum (6%) per annum from the date when such amount is due until the same is paid. If such failure to pay, unless in good faith contested, continues for a period of sixty (60) days, Republic may suspend deliveries of gas hereunder, but the exercise of such right shall be in addition to any and all other remedies available to Republic.

SECTION 7. *Payment for Gasoline.* If Northern elects to extract or remove gasoline from the gas delivered by Republic hereunder, Northern agrees to pay Republic therefor an amount equal to one-eighth (⅛) of the net proceeds derived by Northern from the sale of such gasoline after deducting all costs of stripping and marketing including in such costs reasonable depreciation and all other overhead charges exclusive of interest, and Republic agrees to and does hereby indemnify, hold and save Northern harmless from any loss, damage or expense arising out of any claim made to such one-eighth (⅛) of said net proceeds.

Nothing herein contained shall be construed to require Northern to extract or remove gasoline from the natural gas delivered to it hereunder.

SECTION 8. *Taxes.* Republic agrees, if notified thereof by Northern, to indemnify Northern against payment of any [fol. 103] tax now or hereafter imposed by any governmental authority upon the production of said gas, or the operation of wells or gas properties. Northern shall pay all taxes imposed by lawful governmental authority upon the sale and/or distribution by Northern of said gas.

ARTICLE III

MEASUREMENT

SECTION 1. *Unit of Measurement.* The unit of measurement for natural gas delivered hereunder shall be one thousand (1,000) cubic feet of gas computed at a pressure basis of two pounds (2 lbs.) per square inch above fourteen point four pounds (14.4 lbs.) absolute pressure, and at a storage and flowing temperature agreed upon for the purpose of this contract to be sixty degrees (60°) Fahrenheit; corrections to be made for pressures according to Boyle's Law and for actual temperature and specific gravity according to tests as hereinafter provided.

SECTION 2. *Correction Factors.* The factors used in the computation of volumes are as follows:

(a) Actual temperature of the natural gas flowing through the meter or meters shall be obtained by the use of a recording thermometer so installed as to properly record such temperature. The average hourly temperature recorded each twenty-four (24) hour day shall be used in computing measurements.

(b) The specific gravity of the natural gas shall be determined once each month by joint tests on days as near the first of the month as practicable. The method of tests shall be by standard balance or [fol. 104] by such other method as shall be agreed upon by the parties.

SECTION 3. *Meters.* Republic, at its expense, shall install and maintain in accurate repair at the point of delivery hereinafter specified, orifice meters of ample size and type, of standard manufacture and with volume and pressure-recording gauges for the accurate measurement of the gas delivered hereunder, and Republic will cause said meters to be read each day.

The meters and respective meter readings and meter charts of Republic shall be at all reasonable times accessible to inspection and examination by Northern. The meters shall be calibrated at least once each fifteen (15) days by and at the expense of Republic but in the presence of a representative of Northern if Northern so elects. Reading, calibration and adjustment of Republic's meters and changing of charts shall be done only by Republic but all data with respect thereto shall at all reasonable times be available to Northern. If upon any test the percentage of inaccuracy shall be two per centum (2%) or more, registrations thereof shall be corrected at the rate of said inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half of the time elapsed since the last date of calibration. Following any test, metering equipment found inaccurate shall immediately be restored by Republic to a condition of accuracy. If for any reason any meter is out of service,

and/or out of repair so that the amount of gas delivered cannot be ascertained or computed from the reading there-[fol. 105] of, the gas delivered during the period such meter is out of service and/or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of Northern's check meter if installed and accurately registering;

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation;

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

SECTION 4. *Check Meter.* Northern may, at its option and expense, install and operate check meters to check Republic's meters, but measurement of gas for the purpose of this agreement shall be by Republic's meters only, except in cases hereinabove specifically provided to the contrary. Check meters shall be of the orifice type and shall be subject at all reasonable times to inspection or examination by Republic, but the reading, calibration and adjustment thereof, and changing of charts shall be done only by Northern. Republic hereby grants to Northern the right of ingress to and egress from said check meters at all times for the purpose of installation, operation, repair, reading and/or removal thereof, if located on Republic's property.

SECTION 5. *Protection of Meter Accuracy.* For the purpose of protecting the accuracy of Republic's meters [fol. 106] used for the measurement of gas delivered hereunder and to prevent pulsations of compressors from interfering with accurate measurements, Republic and Northern agree that neither will, without the consent of the other, construct any compressor stations closer than one-half mile from the site upon which said meters are located.

ARTICLE IV

QUALITY

SECTION 1. *Quality of Gas.* Natural gas delivered hereunder shall be sweet gas of merchantable quality conforming to the following specifications:

(1) *Natural Gasoline.* The gas shall be in its natural state as produced, including natural gasoline and all other hydrocarbons therein contained.

(2) *Heating Value.* The heating value of the gas to be delivered hereunder is assumed, but not guaranteed, to have an average total heating value of one thousand (1,000) British Thermal Units (B.T.U.) per cubic foot.

For the purposes of this contract, the basis of British Thermal Unit (B.T.U.) determinations shall be a cubic foot of gas, saturated with water vapor and measured at Thirty inches (30″) of mercury pressure and Sixty (60) degrees Fahrenheit temperature.

(3) *Miscellaneous.* So far as practicable, the gas shall be free from dirt, oil, water, or other foreign substances.

SECTION 2. *Penalty for Failure of Quality.* If in any calendar month the average heating value of the gas de- [fol. 107] livered hereunder shall fall below nine hundred fifty (950) B.T.U. per cubic foot, the price to be paid by Northern to Republic for gas delivered during such month shall be decreased proportionately to the reduction in the heating value below one thousand (1,000) B.T.U. per cubic foot; and Northern shall not be required at any time to receive gas from Republic which has a heating value of nine hundred (900) B.T.U. (or less) per cubic foot.

ARTICLE V

Delivery Pressure and Point of Delivery

Section 1. *Delivery Pressure.* Delivery of natural gas hereunder shall be made by Republic at the highest pressure which can be efficiently maintained by the natural pressure of gas from wells connected to Republic's gathering system, provided, however, that so long as the weighted average field pressure of the wells from which gas is at the time being delivered hereunder shall exceed one hundred fifty (150) pounds, the delivery pressure shall not be less than one hundred (100) pounds to the square inch. In the event that the weighted average field pressure of the wells from which gas is at the time being delivered hereunder shall fall to one hundred fifty (150) pounds (or less) said required delivery pressure may be reduced to not less than fifty (50) pounds per square inch.

Section 2. *Gathering System to be Maintained in Aid of Pressures.* Republic's gathering system shall at all times be maintained, and extensions thereof shall be so designed and maintained, as to deliver gas to Northern through pipe lines of ample size to conform to good practice so that the [fol. 108] pressure drops through said lines from wells to point of delivery to Northern shall be as small as practicable.

Section 3. *Delivery Point.* Delivery of natural gas hereunder shall be made in the Northwest Quarter (NW ¼) of Section 19, Township 33 South, Range 36 West; in Stevens County, Kansas, at the point where the gathering facilities of Republic interconnect with the pipeline system of Northern.

ARTICLE VI

Republic's Right to Audit Certain Records of Northern

Section 1. *As to Volume of Gas Applicable to "Omaha District".* Republic shall have the right to annually audit Northern's records of sales, used gas, and leakage applicable to the "Omaha District," under the provisions of Section 2 of Article I, provided, however, that such audit

shall be made by a Certified Public Accountant at the expense of Republic.

SECTION 2. *As to Gasoline Extracted.* Republic shall have the right of access to such of Northern's records and books, used in the extraction of gasoline as provided in Section 7 of Article II, as may be necessary to audit and determine the correctness of any statement or the amount of any payments which may be made in connection with and incident to the extraction of said gasoline.

[fol. 109]

ARTICLE VII

DEDICATION OF LEASEHOLD ESTATES AND GATHERING FACILITIES

SECTION 1. *Dedication of Gas Acreage.* Republic agrees that from and after the effective date of this contract, all of its gas rights in the gas lands and gas leases set forth and described in Exhibit A, which is hereto attached and made a part hereof (covering approximately 76,800.35 acres, of which 75,000 acres shall at all times during the effective period of this contract constitute the minimum reserve hereunder) shall, subject to the rights of substitution and withdrawal under the terms and limitations hereinafter set forth, constitute as gas reserve which shall be, and is hereby dedicated to the fulfillment of this gas purchase contract; that said Exhibit A correctly describes the gas lands and gas leases in which the gas rights that are dedicated to the fulfillment of this contract exist; and that said gas rights in said gas lands and gas leases described in Exhibit A shall at all time during the life of this contract be impressed with said dedication; provided, however, that:

(a) Republic shall have the right from time to time to substitute acreage of equal value and extent for a like amount of acreage described and included in Exhibit A (or acreage substituted therefor), except acreage held by producing wells which are now or may hereafter be drilled thereon, upon the following conditions:

(i) That Republic shall first have obtained the written approval of Northern to such substitution;

[fol. 110]

(ii) That any such substituted acreage shall, upon substitution, immediately become impressed with this dedication in the same manner and to the same extent theretofore attaching to the acreage described in Exhibit A (or acreage substituted therefor) for which substitution is made; and

(iii) Republic shall prepare and forward to Northern for execution a written release, in recordable form, which by its terms shall release from the dedication the acreage described in Exhibit A (or acreage substituted therefor) for which other acreage has been substituted.

(b) Republic shall have the right at any time, without the consent of Northern, to withdraw from said dedicated reserve any acreage, except acreage held by producing wells which are now or may hereafter be drilled thereon, contained and described in Exhibit A (or acreage substituted therefor as above provided), if for any reason, in the judgment of Republic, such withdrawal shall be necessary or desirable but only upon the following conditions:

(i) That the total acreage remaining in the dedicated reserve after any such withdrawal shall equal or exceed 75,000 acres; and

(ii) That Republic shall give Northern prior notice in writing of its intention to withdraw from the reserve any of the acreages described in Exhibit A (or acreage substituted therefor as hereinabove provided) setting forth in said notice a particular description of the acreage to [fol. 111] be withdrawn, and prepare and forward to Northern a written release, in recordable form, releasing the acreage so withdrawn from its dedication hereunder, which shall be

immediately executed by Northern and returned to Republic.

(c) If any present or future valid order of any duly constituted regulatory body having authority for any reason prohibits the inclusion of all or any part of the acreage in any unit as now or hereafter constituted in computing the allowable for any well or wells now or hereafter located thereon, the acreage so excluded shall be immediately withdrawn from the dedicated reserve.

SECTION 2. *Title to Developed Acreage.* It is hereby agreed and acknowledged that evidence of Republic's titles to its gas leasehold estates in the various tracts of land described in Exhibit A upon which Republic has drilled gas wells (now connected to the gathering system from which gas purchased hereunder is supplied to Northern) has been furnished to and examined by Northern, and that such titles have been accepted by Northern as good and sufficient for the purposes of this contract.

SECTION 3. *Title to Undeveloped Acreage.* Republic represents that it has good merchantable title to its gas leasehold estates in the various tracts of land described in Exhibit A which at the effective date of this contract have not been developed. If and when Republic drills any well or wells thereon, prior to or promptly after the completion thereof, Republic shall furnish Northern a correct legal description of the tract or unitized area upon which any [fol. 112] such well is located, together with title opinions, copies of gas leases, unit agreements, and other evidence of its title and its right to drill upon and produce gas therefrom. Northern shall without undue delay notify Republic as to whether or not such title or titles is or are acceptable as sufficient for the purposes of this contract. If Northern shall determine that any such title or titles are objectionable and the title defects are not remedied by Republic, Republic agrees that it will substitute therefor and in lieu thereof leasehold estates equally well located and held by title acceptable to Northern. It is agreed,

however, that Northern shall not reject any such title as objectionable on the grounds that the same is subject to:

(a) the lien of current taxes not in default;

(b) existing easements for right-of-way or other surface uses which shall not substantially impair or interfere with the rights of Republic to produce and deliver gas therefrom; or

(c) the lien of any existing mortgage granted by the owner of the fee to the land in which Republic owns the gas leasehold which antedates the gas lease by which Republic acquired its leasehold estate, provided,

(i) That Republic has not assumed such lien or the indebtedness thereby secured, nor any direct or indirect obligation to discharge any or all of the principal indebtedness or the interest charges thereon;

(ii) That the indebtedness secured by such existing [fol. 113] mortgage is not disproportionately large when compared with the value of the fee encumbered before and without reference to any enhancement in such value due to the drilling of any well or wells thereon; and

(iii) That the maturity date of the indebtedness secured by such mortgage as fixed thereby is not less than ninety (90) days subsequent to the date when said title examination is made.

SECTION 4. *Dedication of Gathering System and Appurtenant Facilities.* Republic agrees that from and after the effective date of this contract that part of its natural gas gathering system and appurtenant equipment as presently constructed and located in Stevens and Morton Counties, Kansas, together with all gas wells now drilled, and those which may hereafter be drilled, on the dedicated acreage (set forth in Exhibit A), and the lines used to connect such wells to said gathering system, and all replacements, improvements, additions to and betterments of said gathering

system, wells, and appurtenant facilities, shall be, and the same are hereby, dedicated to the fulfillment of this contract.

It is not intended, and nothing contained in the preceding paragraph shall be construed, to include in such dedication any of the gas wells, and equipment used in connection therewith nor any of the gathering lines or other facilities which Republic may hereafter construct and connect to said dedicated facilities for the delivery of gas to Northern from wells drilled on acreage not in- [fol. 114] cluded in the dedicated reserve, and Republic shall always have the right to connect such wells and lines to the dedicated gathering system. Republic shall also have the right to disconnect such undedicated wells and lines from the dedicated facilities upon notice in writing to Northern of its intention so to do, given at least twelve (12) months in advance of the date of said disconnection.

SECTION 5. *Title to Dedicated Facilities.* Republic warrants that at the effective date of this contract it is possessed of good title to the gathering system, gas wells and all appurtenant equipment, which are dedicated to the fulfillment of this contract under the provisions of Section 4 of this Article VII, free and clear of any and all liens and encumbrances.

SECTION 6. *Dedication to Be Exclusive.* It is contemplated by the parties that the gas acreage dedicated under the provisions of Section 1 of this Article VII and the gathering system and appurtenant facilities dedicated under Section 4 of this Article VII shall at all times during the effective period of this contract be exclusively devoted to and used in the production, gathering and delivery of gas by Republic to Northern in the performance and fulfillment of this contract, and Republic covenants and agrees that it will not sell gas produced from any of the dedicated acreage (so long as the same remains dedicated) to any party other than Northern, and that it will not use, or suffer, or permit, any of the dedicated gathering system and appurtenant facilities to be used in connection with any sale or delivery of gas to any party other than Northern.

[fol. 115] The obligations of Republic hereunder are subject to the reservation of sufficient gas for each of the following purposes:

(a) Drilling operations of Republic in the Hugoton Area for gas for resale by Republic under this agreement; and

(b) To perform the obligations of Republic for delivery of gas to the lessors under the terms of the leases covering lands referred to in Article VII of this agreement.

SECTION 7. *Republic's Obligation to Protect Dedication.* Republic covenants and agrees that if, at any time during the effective period of this contract, it shall cause or permit any mortgage, deed of trust or other lien to be placed upon any or all of the properties which are dedicated to the fulfillment of this contract and described in Sections 1 and 4 of this Article VII, any such mortgage, deed of trust or other lien, when so created, shall specifically refer to this contract, and shall contain a specific provision which expressly subordinates such lien to the dedication of the properties and facilities used in supplying gas to Northern hereunder. Nothing herein contained shall be construed as a prohibition against the right of Republic to pledge the benefits accruing to Republic under this contract.

ARTICLE VIII

GAS SUPPLY AND OTHER PARTICULAR COVENANTS

SECTION 1. *Gas Supply.* The obligation of Northern to take or pay for a minimum of 12,500,000,000 cubic feet of [fol. 116] gas in each annual period of this agreement (July 1st to June 30, inclusive), is conditioned upon Republic having available for Northern from wells connected to its said gathering system and owned by or subject to contract to Republic an open-flow capacity at all times during each such period of not less than 342,465,750 cubic feet of gas per day.

Republic, subject to the foregoing provisions concerning connected open-flow capacity and subject to the conditions

hereinafter stated, shall always have the right to supply sixty per centum (60%) of the aforesaid requirements of Northern up to a maximum of thirty-six billion five hundred million (36,500,000,000) cubic feet per year so long as the open-flow capacity of said wells connected to Republic's said gathering system is at all times at least four times the average daily requirement of the four days on which Northern's requirements from Republic shall be the greatest in any thirty-day period, and Republic is able to make delivery of said amounts at the delivery pressure herein provided.

It is understood and agreed that if at any time during the continuance of this contract, the open-flow capacity of said wells of or subject to contract to Republic, connected with Republic's gathering system and available for Northern is less than four times the average daily requirement of the four days on which Northern's requirements hereunder from Republic shall be the greatest in any thirty-day period (meaning by Northern's said requirements hereunder sixty per centum of Northern's total maximum requirements for serving said Omaha District from its said [fol. 117] pipe line, but not exceeding one hundred million cubic feet per day) and if Republic is not able within ninety days thereafter to cause to be developed, maintained and connected with its said gathering system wells owned by or subject to contract to Republic having an open-flow capacity of at least four times the average daily requirement of the four days on which Northern's said requirements hereunder from Republic shall be the greatest in any thirty-day period, then Republic's right to supply sixty per centum of Northern's said requirements shall cease, and in that event Northern is privileged to contract for and purchase an additional supply of gas elsewhere. Northern, however, does agree to take as nearly sixty per centum of its aforesaid requirements from Republic as Northern's conditions and gas purchase obligations contracted by it shall then permit.

In order to determine the open flow capacities of the wells connected to Republic's said gathering system in said Hugoton Area, Republic shall cause said wells to be opened

and tested at intervals to be agreed to by the parties hereto but not more than once in each year; such tests to be made by Republic in the presence of and to the reasonable satisfaction of a representative designated by Northern. Said tests shall be made in accordance with approved modern methods and instruments.

Republic covenants and agrees that it will at all times maintain its gas wells in good condition and to use its best endeavors at all times to maintain a supply of gas adequate to meet Northern's aforesaid requirements under all conditions of this contract.

[fol. 118] SECTION 2. *Northern's Take in Case of Depletion.* Northern agrees that if, through depletion of the supply of gas in the "Hugoton Area", or for other cause beyond its control, Republic is unable to deliver gas in the volumes specified and in the manner provided in this contract, Northern, nevertheless, will continue to purchase gas from Republic and Republic shall continue to sell and deliver gas until the supply in the "Hugoton Area" is depleted or reduced to the extent that Republic, due to such depletion or other cause beyond its control, is unable to deliver at the pressures provided in Section 1 of Article V an average amount of five million (5,000,000) cubic feet per day during a period of six (6) consecutive months, in which event, Northern may at its election cancel this agreement.

SECTION 3. *Parties to Facilitate Performance.* Each of the parties hereto expressly covenants and agrees with the other that it will at all times further and not obstruct the performance of the agreements, covenants and undertakings imposed upon the other party under this contract, and that each of the parties will fulfill and punctually perform and comply with each and all of their respective agreements, covenants and undertakings.

SECTION 4. *Default.* It is covenanted and agreed that if either party shall fail to perform any of the obligations or observe and faithfully keep any of the covenants imposed upon it under and by virtue of this agreement, then in such event the other party may at its option terminate

this agreement by proceeding as follows: The party not in default shall cause a written notice to be served on the [fol. 119] party in default stating specifically the cause for terminating this agreement and declaring it to be the intention of the party giving the notice to terminate the same; thereupon the party in default shall have thirty (30) days after the service of the aforesaid notice in which to remedy or remove the cause or causes stated in the notice for terminating the agreement, and if within said period of thirty (30) days the party in default does so remove and remedy said cause or causes and fully indemnify the party not in default for any and all consequences of such breach, then such notice shall be withdrawn and this agreement shall continue in full force and effect. In case the party in default does not so remedy and remove the cause or causes or does not indemnify the party giving the notice for any and all consequences of such breach, within said period of thirty (30) days, then this agreement shall become null and void from and after the expiration of said period. Any cancellation of this agreement pursuant to the provisions of this Article shall be without prejudice to the right of Republic to collect any amounts then due them for natural gas delivered to the time of cancellation, and without waiver of any remedy to which the party not in default may be entitled for violations of this agreement.

SECTION 5. *Sale of Properties to be Subject to Contract.* Republic and Northern mutually covenant and agree that if at any time during the effective period of this contract either party shall sell or otherwise dispose of any of its properties which are applicable to and used in the performance of this contract, such sale or disposition shall only be made to a responsible party and specifically sub- [fol. 120] ject to this gas purchase contract; provided, however, that nothing herein contained shall be construed to prevent either party from pledging all or any portion of its property as security under any mortgage, deed of trust, or other similar lien, or from pledging this contract or any benefits accruing hereunder to the party making the pledge.

ARTICLE IX

Title to Gas

Republic warrants the title to the natural gas sold and delivered to Northern hereunder and that Republic has good right and lawful authority to sell the same as herein provided, and Republic agrees to indemnify and save Northern harmless from any and all suits, claims and liens of whatsoever nature relating to such gas or the title thereto, and agrees that if Republic's title thereto shall at any time be questioned or involved in litigation, Northern shall have the right to withhold payments (without interest) during the period of such litigation or until said title is freed from such question, but only as to the particular property in litigation or dispute, the proceeds payable in respect of the gas produced from such property or until Republic shall furnish to Northern a bond conditioned to save Northern harmless in form and with sureties acceptable to Northern.

ARTICLE X

Liability of Parties

Each of the parties hereto assumes full responsibility and liability in the maintenance and operation of its re- [fol. 121] spective properties and agrees to indemnify and save harmless the other party from all liability and expense on account of any and all damages, claims or actions, including injury to and death of persons, arising from any act or accident in connection with the installation, presence, maintenance and operation of the property and equipment of the indemnifying party.

Neither party shall be liable to the other for any damages occasioned by failure in any respect to perform this agreement which shall be caused by accident to or breakage of pipe lines, machinery or equipment, fires, floods, storms, weather conditions, strikes, riots, legal interferences, Acts of God or the public enemy, or, without limitation by enumeration, any other cause beyond its reasonable control, provided the party in default shall promptly and diligently

take such action as may be necessary and practicable under the then existing circumstances to remove the cause of the default and resume performance of the contract.

ARTICLE XI

Term of Contract

Subject to earlier termination under the provisions hereof, this agreement shall continue in force from the date hereof for a period of twenty (20) years, and thereafter so long as Republic sha" have gas available for sale to Northern, as and to the extent provided in and subject to the terms and conditions of this agreement.

[fol. 122]

ARTICLE XII

Miscellaneous

Section 1. *Notices.* Any notice or notices given by either party under the terms of this agreement shall be sent by registered mail to the following addresses:

(1) Republic Natural Gas Company
1505 Federal Street
Dallas, Texas

(2) Northern Natural Gas Company
Aquila Court Building
Omaha, Nebraska

Either party may change its address under this Section at any time upon written notice.

Section 2. *Commission Jurisdiction.* This contract is subject to all valid legislation with respect to the subject matter hereof, either State or Federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction.

Section 3. *Assignment.* This contract, and each of its covenants and obligations, shall inure to the benefit of and be binding upon the successors, trustees and assigns of the respective parties hereto.

SECTION 4. *Former Gas Purchase Contracts.* Republic and Northern mutually agree that this Contract is a simplified restatement of their contractual obligations as "Seller" and "Buyer" respectively, of natural gas from the Hugoton Gas Field, originating under and established by the Gas Purchase Contract dated May 27, 1930, and all agreements supplemental of and amendatory thereto, and as such supersedes and cancels said Contract of May 27, 1930.

[fol. 123]

APPENDIX II

(Exhibit 5)

AMENDMENT

to

NATURAL GAS PURCHASE CONTRACT

AMENDMENT, dated June 30, 1953, by and between REPUBLIC NATURAL GAS COMPANY, a Delaware corporation, herein called "REPUBLIC" and NORTHERN NATURAL GAS COMPANY, a Delaware corporation, herein called "NORTHERN," to the Natural Gas Purchase Contract dated December 21, 1945, between Republic and Northern, hereinafter called the "CONTRACT."

WITNESSETH:

WHEREAS, the Contract was a simplified restatement of the contractual obligations of the parties originating under and established by the Gas Purchase Contract of May 27, 1930, and all agreements supplemental and amendatory thereto; and

WHEREAS, the parties hereto are, as of even date herewith, executing an Amendment to the Natural Gas Purchase Contract dated September 13, 1945, between said parties; and

WHEREAS, the parties hereto are, as of even date herewith, entering into a Preferential Right to Purchase Contract.

NOW, THEREFORE, in consideration of the foregoing, and in consideration of the mutual covenants and premises [fol. 124] herein contained, the parties do hereby agree as follows:

PART ONE

The Contract between Republic and Northern shall be amended and supplemented as follows:

A. SECTION 1 OF ARTICLE I SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 1. Sale and Purchase Commitments.* Subject to the terms and conditions and within the limitations hereinafter set forth, Republic agrees to sell and deliver to Northern and Northern agrees to receive, purchase and pay for natural gas in its natural state produced by Republic from the lands described in Exhibit 'A', attached hereto and made a part hereof."

B. THE FOLLOWING SHALL BE ADDED AS SECTION 5 OF ARTICLE I:

"*Section 5. Delivery from Individual Leases.* Northern shall take gas from each of Republic's wells connected to Northern's gathering system with such continuity and in sufficient quantities as to protect the leases upon which such wells are located against termination for non-production, subject to the ability of such wells to so produce."

C. THE FOLLOWING SHALL BE ADDED AS SECTION 6 OF ARTICLE I:

"*Section 6. Limitations of Obligations to Purchase and Deliver.* Subject to the other limitations herein stated the obligations of Northern to purchase and of Republic to deliver the quantities of gas herein provided for shall, at all times, be subject to the ability of Re- [fol. 125] public's wells, which at the time are connected to Northern's gathering system, to produce without waste such quantities of gas when operated in accordance with prudent gas field practice at the delivery capacity at which such wells are permitted by law to produce."

D. SECTION 1 OF ARTICLE II SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 1. Price Until June 30, 1958.* For each One Thousand (1,000) cubic feet of natural gas delivered hereunder during the five (5) year period commencing July 1, 1953, and ending June 30, 1958, Northern shall pay Republic a price of Ten Cents (10¢)."

E. SECTION 2 OF ARTICLE II SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 2. Price After July 1, 1958.* For each One Thousand (1,000) cubic feet of natural gas delivered hereunder during the five (5) year period commencing July 1, 1958, and ending June 30, 1963, and during each subsequent five (5) year period during the remaining term of this contract, Northern shall pay Republic a price to be determined by negotiation and agreement by Republic and Northern as the fair, just and reasonable price to be paid, during each such five (5) year period, for natural gas produced, in the area in which Republic's wells and leases are situated, for interstate transmission; provided, however, the price to be paid hereunder subsequent to July 1, 1958, shall be not less than Ten Cents (10¢).

"Representatives of Republic and Northern shall meet and negotiate as frequently as necessary during the [fol. 126] period March 1 to May 1 of the year in which the price to be paid hereunder is subject to possible change, for determination of the price to be paid during the ensuing five (5) year period.

"In the event the parties hereto shall be unable to agree by May 1 of such year upon such price, then the fair, just and reasonable price to be paid for natural gas produced, in the area in which Republic's wells and leases are situated, for interstate transmission, shall be determined by arbitration. For the purpose of arbitration, Republic and Northern shall each select one arbitrator and the two arbitrators shall select a third. In the event the two arbitrators are unable to agree upon such third arbitrator, such arbitrator shall be selected

by the Senior Federal District Judge for the State of Kansas."

F. SECTION 4 OF ARTICLE II SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 4. Payment for Gas.* Northern agrees to make payment on or before the 25th day of each month for all gas delivered hereunder during the preceding month."

G. SECTION 7 OF ARTICLE II SHALL BE DELETED.

H. SECTION 8 OF ARTICLE II SHALL BE RENUMBERED AS SECTION 7 OF ARTICLE II.

I. SECTION 2 OF ARTICLE II SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 2. Computation of Volume of Gas Delivered.* The volumes of gas delivered to Northern hereunder as measured at pipeline pressures and temperatures shall be computed by Northern from the meter records and converted into the unit of measurement specified [fol. 127] in Section 1 of this Article III, in accordance with the applicable provisions of the American Gas Association's 'Gas Measurement Committee Report No. 2,' dated May 6, 1935, as presently effective, or hereafter revised, and any duly authorized amendments thereto; provided, however, that Reynold's number, expansion and supercompressibility factors shall be excluded in all such computations and the gas shall be assumed to obey Boyle's Law, unless by valid order, applicable hereto, issued by the State Corporation Commission of the State of Kansas, or its successor in jurisdiction, it is required that corrections be made on account of such factors in computing the volumes of gas delivered hereunder, in which event corrections for such factors in accordance with such order shall be made in such computations. For the purpose of such computations, the *atmospheric pressure* is assumed and agreed to be 13.2 pounds per square inch absolute at the place of measurement.

"The *temperature* of the gas flowing through the meter, or meters, is hereby assumed and agreed upon, for the purposes of this contract, at 60 degrees Fahrenheit; provided, however, that Northern, at its option, may at any time install a recording thermometer to record the temperature of the gas flowing through the meter, or meters, in which event the arithmetic average of the recorded hourly temperatures of the flowing gas shall thereafter, as long as said thermometer is installed, be used in correcting the volume delivered hereunder to the unit of measurement specified in Section 1 of this Article III.

"The *specific gravity* of the gas shall be determined by joint tests at interyals of approximately six (6) months duration. The method of test shall be by stand- [fol. 128] ard gravity balance and the last such gravity so obtained shall be used in the determination of the volume delivered hereunder."

J. SECTION 3 OF ARTICLE III SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 3. Meters.* The gas to be delivered hereunder shall be measured by adequate meters of standard type installed, operated and maintained by Northern at its sole expense, at or near the points of delivery hereunder, on sites to be provided by Northern. When wells are delivering gas, such meters shall at all times be in service and recording except when measurement equipment is being tested or repaired. Such facilities of Northern, which are installed subsequent to the date of this agreement, shall be constructed in accordance with the applicable provisions of the American Gas Association's 'Gas Measurement Committee Report No. 2,' dated May 6, 1935. Republic agrees that such facilities in place as of the date of this contract are of satisfactory design.

"Such meters shall be tested once a month by Northern and shall at all reasonable times be subject to check, test and inspection by representatives of Republic in the presence of representatives of Northern.

Upon Republic's request, Northern shall mail or deliver to Republic for checking and calculation all meter charts and other data or records used in the measurement of gas delivered hereunder subject to return by Republic within thirty (30) days after the receipt thereof, after which return the charts and records shall be kept by Northern for a period of five (5) years for the use of both parties.

"The meters and respective meter readings and meter charts of Northern shall be at all reasonable times [fol. 129] accessible to inspection and examination by Republic. Reading, calibration and adjustment of Northern's meters and changing of charts shall be done only by Northern, but all data with respect thereto shall at all reasonable times be available to Republic. With respect to wells which are not delivering gas, such meters shall be left in service and meter charts shall be changed at least once each month; provided, that Northern shall not be required to wind meter clocks when gas is not passing through the meters. If, upon any test, the percentage of inaccuracy shall be two per centum (2%) or more, registrations thereof shall be corrected at the rate of said inaccuracy for any period which is definitely known and agreed upon, but in the event the period is not definitely known and agreed upon, then for a period extending back one-half of the time elapsed since the last date of calibration. Following any test, metering equipment found inaccurate shall immediately be restored by Northern to a condition of accuracy. If, for any reason, any meter is out of service, or out of repair so that the amount of gas delivered cannot be ascertained or computed from the reading thereof, the gas delivered during the period such meter is out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

"(a) By using the registration of check meters if installed by either party hereto and accurately registering;

"(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation;

[fol. 130]

"(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately."

K. SECTION 4 OF ARTICLE III SHALL BE DELETED.

L. SECTION 5 OF ARTICLE III SHALL BE DELETED.

M. SECTION 1 OF ARTICLE V SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 1. Delivery Pressure.* Delivery of natural gas hereunder from each of Republic's wells shall be made at the highest pressure which can be efficiently maintained by the natural pressure of each such well and Northern shall maintain in its pipeline at the delivery points hereunder such pressures as will permit delivery of the total volume of gas agreed to be purchased under this Contract; provided, however, that Northern shall not be required to maintain a pressure in its pipeline system at the point of delivery of gas from any well of Republic lower than seventy-five per cent (75%) of the arithmetic average of the 72-hour shut-in wellhead gauge pressure of all of Republic's wells delivering gas hereunder; provided, further, however, that Northern shall not be required to maintain a pressure in its gathering system at the point of delivery of gas from any well of Republic below seventy-five (75) pounds per square inch gauge pressure."

N. SECTION 2 OF ARTICLE V SHALL BE DELETED.

O. SECTION 3 OF ARTICLE V SHALL BE RENUMBERED AS SECTION 2 OF ARTICLE V AND AMENDED TO READ AS FOLLOWS:

"*Section 2. Points of Delivery.* Delivery of natural gas hereunder shall be at the point Northern connects [fol. 131] its gas-gathering pipelines to the side-gate

valve of Republic, installed on the wellhead of each of Republic's wells."

P. SECTION 2 OF ARTICLE VI SHALL BE DELETED.

Q. SECTION 1 OF ARTICLE VII SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 1. Dedication of Gas Acreage.* Republic represents that it is either the owner of oil and gas leases or the owner of the mineral rights under all of the gas lands set forth and described in Exhibit 'A', which is attached hereto and made a part hereof. Republic agrees and covenants that it will, at its own cost and expense, maintain all such leases and mineral rights in full force and effect, insofar as such maintenance is within the control of Republic, until said leases and rights are released from the provisions of this agreement as hereinafter provided.

"Republic agrees that from and after the effective date of this Contract, all of its gas rights in the gas lands and gas leases set forth and described in Exhibit 'A', which is hereto attached and made a part hereof, shall constitute a gas reserve which, together with Republic's wells and appurtenant facilities, shall be and are hereby exclusively dedicated to the fulfillment of this Contract and that this Contract is hereby expressly made a covenant running with said land and leases. Republic covenants and agrees that it will not sell gas produced from any of the dedicated acreage, so long as the same remains dedicated, to any party other than Northern; that said Exhibit 'A' correctly describes the gas lands and gas leases in which the gas rights that are dedicated to the fulfillment of this Contract exist; and that said gas rights in said [fol. 132] gas lands and gas leases described in Exhibit 'A' shall at all times during the life of this Contract be impressed with said dedication; provided, however, that Republic shall have the right to use gas produced from said lands for:

"(a) Drilling, reworking or remedial operations of Republic on acreage dedicated to this Contract; and

"(b) Fuel when required for use in internal combustion engines employed in lifting oil to the surface of the ground from any well hereafter drilled on such acreage; and

"(c) To perform the obligations of Republic for delivery of gas to the lessors under the terms of the present leases covering lands covered hereunder."

R. SECTION 2 OF ARTICLE VII SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 2. Title to Acreage.* It is hereby agreed and acknowledged that evidence of Republic's titles to its gas leasehold estates in the various tracts of land described in Exhibit 'A', upon which Republic has drilled gas wells, has been furnished to and examined by Northern, and that such titles have been accepted by Northern as good and sufficient for the purposes of this Contract."

S. SECTIONS 3, 4, 5, AND 6 OF ARTICLE VII SHALL BE DELETED.

T. SECTION 7 OF ARTICLE VII SHALL BE RENUMBERED AS SECTION 3 AND SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 3. Republic's Obligation to Protect Dedication.* Republic covenants and agrees that if, at any [fol. 133] time, it shall cause or permit any mortgage, deed of trust or other lien to be placed upon any or all of the properties which are dedicated to the fulfillment of this Contract, any such mortgage, deed of trust or other lien, when so created, shall specifically refer to this Contract, and shall contain a specific provision which expressly subordinates such lien to the dedication of the properties and facilities used in supplying gas to Northern hereunder. Nothing herein contained shall

be construed as a prohibition against the right of Republic to pledge the benefits accruing to Republic under this Contract."

U. THE FOLLOWING SHALL BE ADDED AS SECTION 4 OF ARTICLE VII:

"*Section 4. Gathering System and Facilities.* Northern shall prudently operate and maintain in good operating condition the existing gas-gathering system which is connected with the side-gate valves of Republic installed on the wellheads of each of Republic's wells. Republic agrees that such facilities in place, as of the date of this Contract, are of satisfactory size and design.

"In an effort to provide a pipeline connection with each well of Republic, situated on acreage covered hereunder, hereafter drilled by Republic on said acreage with reasonable promptness following the completion thereof, Northern agrees to diligently endeavor to secure any governmental authorizations which may be required for the acquisition of such materials as may be required for the construction of said line and to diligently endeavor to secure such materials.

"At the earliest practicable date following Northern's acquisition of acceptable right-of-way agreements, any [fol. 134] requisite governmental authorizations, and suitable and necessary materials, Northern, at its own expense, shall provide and construct, and thereafter operate and maintain, a suitable gas-gathering pipeline to each of such wells in accordance with approved field practices.

"Northern shall not be obligated to connect any well of Republic which does not have the ability to produce at a daily average rate of 200,000 cubic feet or more of natural gas per day at the end of seventy-two (72) hours' flow against a wellhead back-pressure equal to 80% of the shut-in wellhead pressure of such well; provided, however, that if Northern elects not to connect to any such well, Northern nevertheless shall, upon Republic's request, accept gas from any such well of

smaller capacity if Republic shall bear the cost of installing and operating all facilities necessary to measure and deliver the gas from such well into Northern's system at the nearest practicable point on such system.

"Except with respect to replacement wells for presently existing wells, Northern shall not be obligated to connect to:

"(a) Any well which Republic hereafter drills to a depth of 3,000 feet or less which has less than 480 acres attributed thereto;

"(b) More than one well producing from the same common source of supply on acreage theretofore attributed to production from such common source of supply.

"With respect to all wells which Northern is not obligated to connect, if Republic elects to connect any such well, it shall bear the cost of installing and oper- [fol. 135] ating all facilities necessary to measure and deliver the gas from any such well into Northern's system at the nearest practicable point on such system and Northern shall purchase gas therefrom in accordance with all the applicable terms and conditions of this Contract."

V. THE FOLLOWING SHALL BE ADDED AS SECTION 5 OF ARTICLE VII:

"*Section 5.* The gas wells connected under this Contract shall be equipped, operated and maintained without cost to Northern, in accordance with approved practices. In the event any of Republic's wells delivering gas hereunder should produce liquids to an extent whereby the production of gas is substantially impaired, then Republic agrees to take such steps as a reasonably prudent operator would take to rectify such condition. Northern shall have the right at all reasonable times to require Republic to inspect, test and blow said wells in the presence of a representative of Northern.

"In the event Northern desires to do any work on its facilities directly engaged in accepting delivery of gas hereunder from any of Republic's wells, or desires to have Republic do any work on Republic's wells, Northern agrees to so notify Republic. Northern agrees to have its field representatives report to Republic's field representatives any observed irregularity of well performance which would indicate the need for blowing, testing or remedial work on any of Republic's wells which are subject to this agreement, provided, however, that neither Northern nor its representatives assume any responsibility or liability for failure to observe any such irregularity. In the event Republic de-
[fol. 136] sires to do any testing or remedial work on any of its wells, Republic agrees to so notify Northern. Republic shall make available to Northern such information regarding drilling records and well equipment as Northern may reasonably request."

W. THE FOLLOWING SHALL BE ADDED AS SECTION 6 OF ARTICLE VII:

"*Section 6. Release of Acreage.* In the event there should accrue to Northern the right to cease the purchase of gas from any well of Republic, or the right not to purchase gas from any replacement well of Republic or any new non-replacement well of Republic, for any of the reasons elsewhere stated in this agreement, and Northern shall elect to exercise such right, Northern shall so notify Republic and Republic shall have sixty (60) days following the date of such notice within which, at its option, to rectify the condition giving rise to the cause of Northern's election to not purchase gas from such well. In the event Republic does not rectify the condition giving rise to Northern's election not to purchase gas from any such well within said time limit, and Northern does not elect to accept gas without the condition being rectified, Northern and Republic shall execute a release of said well and the acreage attributable thereto, for the particular horizon from which

the well is then capable of producing, from all of the provisions of this agreement.

"In the event there should accrue to Republic the right to cease the delivery of gas from any well and Republic should elect at its option not to deliver gas from any of its wells for any of the reasons elsewhere stated in this agreement, Republic shall so notify [fol. 137] Northern and Northern shall have sixty (60) days following the date of said notice within which, at its option, to rectify the condition giving rise to the cause of Republic's election to not deliver gas from such well. In the event Northern does not rectify the condition giving rise to Republic's election not to deliver gas from any such well within said time limit, and Republic does not elect to deliver gas without the condition being rectified, Northern and Republic shall execute a release of said well and the acreage attributable thereto, for the particular horizon from which the well is then capable of producing, from all of the provisions of this agreement.

"In the event there has accrued to Republic the right to cease the delivery of gas from any such well, and if Republic shall elect to surrender its leases attributed to any such well, Republic agrees to notify Northern in writing of such contemplated action. Upon request in writing by Northern given within fifteen days after receipt of Republic's notice, Republic shall assign to Northern all of Republic's right, title, and interest in such leases. If Republic shall own the mineral rights under the acreage attributable to any such well, then Republic shall grant Northern a gas lease thereon which shall be in the customary form and for a primary term of one (1) year. If there should be a gas well or wells located on any such leasehold or mineral interest, Northern shall pay Republic the reasonable salvage value of the casing and other equipment in such well or wells."

X. SECTION 1 OF ARTICLE VIII SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 1. Gas supply.* The obligation of Northern to take or pay for a minimum of 12,500,000,000 cubic feet

[fol. 138] of gas in each annual period of this agreement (July 1st to June 30, inclusive), is conditioned upon Republic having available for Northern an open-flow capacity at all times during each such period of not less than 342,465,750 cubic feet of gas per day.

"Republic, subject to the foregoing provisions concerning connected open-flow capacity and subject to the conditions hereinafter stated, shall always have the right to supply sixty per centum (60%) of the aforesaid requirements of Northern up to a maximum of thirty-six billion five hundred million (36,500,000,000) cubic feet per year so long as the open-flow capacity of said wells is at all times at least four times the average daily requirement of the four days on which Northern's requirements from Republic shall be the greatest in any thirty-day period, and Republic is able to make delivery of said amounts at the delivery pressure herein provided.

"It is understood and agreed that if at any time during the continuance of this Contract, the open flow capacity of said wells of Republic available for Northern is less than four times the average daily requirement of the four days on which Northern's requirements hereunder from Republic shall be the greatest in any thirty-day period (meaning by Northern's said requirements hereunder sixty per centum of Northern's total maximum requirements for serving said Omaha District from its said pipeline, but not exceeding one hundred million cubic feet per day) and if Republic is not able within ninety days thereafter to cause to be developed and maintained wells having an open-flow capacity of at least four times the average daily requirement of the four days on which Northern's said requirements here- [fol. 139] under from Republic shall be the greatest in any thirty-day period, then Republic's right to supply sixty per centum of Northern's said requirements shall cease, and in that event Northern is privileged to contract for and purchase an additional supply of gas elsewhere. Northern, however, does agree to take as nearly sixty per centum of its aforesaid requirements from

Republic as Northern's conditions and gas purchase obligations contracted by it shall then permit.

"In order to determine the open-flow capacities of said wells in said Hugoton Area, Republic shall cause said wells to be opened and tested at intervals to be agreed to by the parties hereto but not more than once in each year; such tests to be made by Republic in the presence of and to the reasonable satisfaction of a representative designated by Northern. Said tests shall be made in accordance with approved modern methods and instruments.

"Republic shall have full control of the operations and maintenance of its gas wells; provided, however, Northern shall have the right to regulate the rate of flow of gas from each well to the extent necessary to enable it to purchase the aggregate volume of gas herein agreed to be purchased. Republic covenants and agrees that it will at all times maintain its gas wells in good condition and to use its best endeavors at all times to maintain a supply of gas adequate to meet Northern's aforesaid requirements under all conditions of this Contract."

Y. SECTION 2 OF ARTICLE VIII SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 2. Northern's Take in Case of Depletion.* Northern agrees that if, through depletion of the supply [fol. 140] of gas in the 'Hugoton Area,' or for other cause beyond its control, Republic is unable to deliver gas in the volumes specified and in the manner provided in this Contract, Northern, nevertheless, will continue to purchase gas from Republic and Republic shall continue to sell and deliver gas until the supply in the 'Hugoton Area' is depleted or reduced to the extent that Republic, due to such depletion or other cause beyond its control, is unable to deliver an average amount of five million (5,000,000) cubic feet per day during a period of six (6) consecutive months, in which event, Northern may, at its election, cancel this agreement."

Z. SECTION 4 OF ARTICLE VIII SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 4. Default.* It is covenanted and agreed that if either party shall fail to perform any of the obligations or observe and faithfully keep any of the covenants imposed upon it under any by virtue of this agreement, then in such event the other party may at its option terminate this agreement by proceeding as follows:

"The party not in default shall cause a written notice to be served on the party in default stating specifically the cause for terminating this agreement and declaring it to be the intention of the party giving the notice to terminate the same; thereupon, the party in default shall have thirty (30) days after the service of the aforesaid notice in which to remedy or remove the cause or causes stated in the notice for terminating the agreement, and if within said period of thirty (30) days the party in default does so remove and remedy said cause or [fol. 141] causes or fully indemnifies the party not in default for any and all consequences of such breach, then such notice shall be withdrawn and this agreement shall continue in full force and effect. In the event the party in default does not so remedy and remove the cause or causes or does not indemnify the party giving the notice for any and all consequences of such breach, within said period of thirty (30) days, then this agreement shall become null and void from and after the expiration of said period. Any cancellation of this agreement pursuant to the provisions of this Article shall be without prejudice to the right of Republic to collect any amounts then due them for natural gas delivered to the time of cancellation, and without waiver of any remedy to which the party not in default may be entitled for violations of this agreement."

AA. SECTION 5 OF ARTICLE VIII SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 5. Sale of Properties to Be Subject to Contract.* Republic and Northern mutually covenant and

agree that if at any time during the effective period of this Contract either party shall sell or otherwise dispose of any of its properties which are applicable to and used in the performance of this Contract, such sale or disposition shall only be made to a responsible party and specifically subject to this Contract; provided, however, that nothing herein contained shall be construed to prevent either party from pledging, subject to this Contract, all or any portion of its property as security under any mortgage, deed of trust or other similar lien, or from pledging this Contract or any benefits accruing hereunder to the party making the pledge."

[fol. 142] AB. ARTICLE IX, "TITLE TO GAS," SHALL BE AMENDED TO READ AS FOLLOWS:

"Republic warrants the title to the natural gas sold and delivered to Northern hereunder and that Republic has good right and lawful authority to sell the same as herein provided, and Republic agrees to indemnify and save Northern harmless from any and all suits, claims and liens of whatsoever nature relating to such gas or the title thereto, and agrees that if Republic's title thereto shall at any time be questioned or involved in litigation, Northern shall have the right to withhold payments (without interest) of the proceeds payable in respect of the gas produced from the particular property in litigation or dispute during the period of such litigation or until said title is freed from such question or until Republic shall furnish Northern a bond conditioned to save Northern harmless in form and with sureties acceptable to Northern."

AC. ARTICLE X, "LIABILITY OF PARTIES," SHALL BE AMENDED TO READ AS FOLLOWS:

"Each of the parties hereto assumes full responsibilty and liability in the maintenance and operation of its respective properties and for the acts or omissions of their respective employees, agents or contractors, and agrees to indemnify and save harmless the other party from all liability and expense on account of any and all

damages, claims or actions, including injury to and death of persons, arising from any act or accident in connection with the installation, presence, maintenance and operation of the property and equipment of the indemnifying party or any act or omission of any agent, employee or contractor of the indemnifying party.

[fol. 143] "Neither party shall be liable to the other for any damages occasioned by failure in any respect to perform this agreement which shall be caused by accident to or breakage of pipe lines, machinery or equipment, fires, floods, storms, weather conditions, strikes, riots, legal interferences, acts of God or the public enemy, or, without limitation by enumeration, any other cause beyond its reasonable control, provided the party in default shall promptly and diligently take such action as may be necessary and practicable under the then existing circumstances to remove the cause of the default and resume performance of the Contract."

AD. ARTICLE XI, "TERM OF CONTRACT," SHALL BE AMENDED TO READ AS FOLLOWS:

"Subject to earlier termination under the provisions hereof, this Agreement shall continue in force from the date hereof for a period of twenty (20) years and thereafter so long as natural gas can be produced hereunder in commercial quantities from any well located on the acreage subject to this contract; provided, however, that whenever gas can not be produced by Republic, or transported by Northern to its main transmission system, from any such well in profitable quantities, Republic may elect to cease to deliver, or Northern may elect to cease to purchase, gas hereunder, as the case may be, but only with respect to such well and the acreage attributable thereto, for the particular horizon from which the well is then capable of producing, by giving the other party at least sixty (60) days prior written notice of such election."

[fol. 144] AE. SECTION 1 OF ARTICLE XII SHALL BE AMENDED TO READ AS FOLLOWS:

"*Section 1. Notices.* Any notice or notices given by either party under the terms of this agreement shall be sent by registered mail to the following addresses:

(1) Republic Natural Gas Company
311 South Akard Street
Dallas, Texas

(2) Northern Natural Gas Company
2223 Dodge Street
Omaha, Nebraska

"Either party may change its address under this Section at any time upon written notice."

AF. SECTIONS 4 AND 5 OF ARTICLE XII SHALL BE RENUMBERED AS SECTIONS 6 AND 7 AND THE FOLLOWING ADDED AS SECTION 4:

"*Section 4.* To the extent that Republic is authorized to do so, Republic hereby agrees to grant and assign to Northern all requisite easements and rights-of-way over, across and under any of the lands described in Exhibit 'A' and the right to perform thereon any acts necessary or convenient for carrying out the terms of this Contract."

AG. THE FOLLOWING SHALL BE ADDED AS SECTION 5 OF ARTICLE XII:

"*Section 5. Restatement of Acreage.* Either party hereto shall have the right to request a restatement or revision of Exhibit 'A', but not oftener than once a year, and when same shall have been completed and agreed to by both parties hereto, it shall replace the Exhibit 'A' then attached to and made a part of [fol. 145] this Contract, and shall then be considered as the Exhibit 'A' referred to herein and made a part hereof."

PART TWO

There is attached hereto and made a part hereof a revised Exhibit "A" wherein are described not only all of the gas lands and gas leases presently dedicated to the Contract but also approximately 7,700 acres of additional gas lands and gas leases not heretofore subject to said Contract and which by this amendment are dedicated to it. All references in said Contract to Exhibit "A" shall henceforth be referable to the revised Exhibit "A" attached hereto.

PART THREE

Any and all amendments to the Contract, other than this present amendment, are hereby cancelled and of no further force and effect.

In Witness Whereof, the parties hereto have executed this Amendment.

"Northern"	"Republic"
Northern Natural Gas Company	Republic Natural Gas Company
By /s/ J. F. Merriam President	By /s/ W. H. Wildes President
Attest /s/ B. H. Harper Secretary	Attest /s/ Floyd G. Miller Asst. Secretary
Date Executed 6-30-53	Date Executed 6-30-53
(Seal)	(Seal)

[fol. 146] Acknowledgment of Service of Appellant's Abstract of Record and Waiver of Proof Thereof (omitted in printing).

[fol. 153]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,128

NORTHERN NATURAL GAS COMPANY, Appellant,

v.

STATE CORPORATION COMMISSION, Appellee.

SYLLABUS BY THE COURT

1. GAS—*Powers of Corporation Commission—Ratable Taking by Purchaser.* The provisions of G. S. 1959 Supp., 55-703 are considered and held to be sufficient to give the Corporation Commission powers to pass rules to insure the fair and equitable taking of natural gas from a common source, and in such an attempt to provide for the ratable taking of natural gas by a purchaser.

2. SAME—*Order of Commission—As to Ratable Taking by Purchaser—Validity.* It is further decided that such an order as described in the first paragraph hereof did not impair the obligation of a contract possessed by the purchaser or impinge upon other constitutional rights of the purchaser.

3. SAME—*Order of Commission—As to Ratable Taking by Purchaser—Federal Power Commission's Authority Not Impaired.* It is also further decided that the order of the Commission as to the ratable taking of natural gas concerns only the production and gathering of gas and in no way impairs the control of the Federal Power Commission over the transportation of natural gas in interstate commerce under the federal Natural Gas Act, 15 U. S. C. A. §717 *et seq.*

Appeal from Finney district court; ROLAND H. TATE, judge. Opinion filed June 10, 1961. Affirmed.

Mark H. Adams, II, of Wichita argued the cause, and Mark H. Adams, Charles E. Jones, William I. Robinson, J.

Ashford Manka, Clifford L. Malone, John S. Seeber and Floyd E. Jensen of Wichita; Lawrence I. Shaw, F. Vinson Roach, and Patrick J. McCarthy of Omaha, Nebraska; Ray H. Calihan, Logan N. Green, Daniel R. Hopkins and Ray H. Calihan, Jr., of Garden City were with him on the briefs for the appellant.

[fol. 154] Charles C. McCarter, general counsel, argued the cause, and S. F. Fleeker, assistant general counsel, was with him on the briefs for the appellee.

OPINION—Filed June 10, 1961

The opinion of the court was delivered by

JACKSON, J.: The appellant Northern Natural Gas Company began a judicial review action in the court below to review an order of the Corporation Commission directing it to take gas ratably from all gas wells in the Kansas Hugoton Gas Field to which its lines were connected including the gas wells owned by Republic Natural Gas Company with which company it had a special contract as to the purchase of gas. The district court affirmed the order of the Commission, and the appellant brings the matter to this court on an appeal from the district court's decision.

Throughout the remainder of this opinion we shall refer to the above parties as "Northern," "Republic," and the "Commission."

For many years Northern and Republic have been parties to a contract under which Northern agreed to take and pay for a sufficient amount of natural gas to supply 60 percent of the supply needed by Northern to satisfy the needs of its customers in a certain area in Iowa and Nebraska. The exact location of this area in Nebraska and Iowa is not important, but it is referred to in the briefs as the Omaha District. This contract covers only some 144 wells owned by Republic and in the briefs this group of wells is referred to as the "Republic A" wells.

The above contract has been before this court in the former case of *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708, in which opinion a more detailed account of the contract may be found.

There can be no question that Northern is engaged in the interstate transportation of natural gas by pipe line for sale in states other than Kansas, as defined in the Natural Gas Act. In the last case mentioned, the question at issue was the amount of gas which could be lawfully produced under the above contract and regulations of the Commission. The important part of the syllabus of the case just cited reads: "An operator of gas wells . . . as to the amount of gas he can produce from the wells, is governed by the allowables for such wells made by the commission for the time in question and not by slightly less than three times such allowables."

Another case which is connected with this same contract between Republic and Northern is that of *Republic Natural Gas Co.* v. *State Corporation Commission*, 173 Kan. 172, [fol. 155] 244 P. 2d 1196. Those intergsted in an account of the manner of establishing proration allowables for gas wells in the Hugoton field are directed to the opinion in the last mentioned case. The case affirmed the Commission in making an order refusing to reinstate canceled "underages" of certain gas wells owned by Republic. The canceled underages had been canceled according to the rules of the Commission applying to the entire Hugoton field.

As early as 1938, Northern had begun to purchase additional gas supply in the Hugoton field in addition to the Republic "A" wells. In 1949, Northern entered into a gas purchase contract with Cities Service Oil Company. Thereafter, Northern purchased other gas supply and now owns some 125 gas purchase contracts.

These gas purchase contracts cover a total of some 1,100 gas wells in the Hugoton field. Such contracts contain provisions for the ratable taking of gas between all gas wells with the exception that Republic "A" wells are specifically excepted from the provision for ratable taking and are given preference where the demand for gas does not equal the allowables for all of the wells. A copy of such contracts is contained in the abstract but need not be reproduced in this opinion.

Northern's position is quite clearly and forcefully stated in the following quotation taken from its brief:

> "As Northern has interpreted its commitments under its gas purchase contracts in such field, when Northern's market requirements from the field are less than the total allowables assigned to the wells connected to Northern, Northern's contractual commitment (as previously interpreted by the Court) under the Republic "A" contract is first deducted from Northern's gas requirements and allocated to the Republic "A" wells. The balance of Northern's requirements is then allocated ratably to all other wells to it connected in such Field."

Northern further tells us that from 1944 until 1958, Northern was largely able to take ratably from all wells connected with its lines, but it seems to concede that during 1958, it took gas from Republic "A" wells at a much greater rate than from the rest of the wells connected to its gathering lines. In January, 1959, the Cities Service wells connected to Northern's lines had a monthly allowable of 2,084,874 Mcf. They had an underage of 11,411,727 Mcf., and 123,711 Mcf. of these underages were canceled by the Commission under its general rules as being underproduced in excess of six times the January current allowable. Northern's other connections aside from Republic "A" wells had a [fol. 156] January current allowable of 9,309,441 Mcf. and a total underage of 48,604,070 Mcf. The net status of these wells was 522.09 percent underproduced, and they suffered cancellation of 409,393 Mcf. of the aforementioned underage.

In contrast, Republic "A" wells had a current January allowable of 2,674,390 Mcf. and an overage of 114,858 Mcf. They were overproduced 4.29 percent in that particular month.

Northern makes no claim that it would not have been possible to take gas ratably from all of its wells. It only claims that the contract with Republic gives it the right to prefer Republic "A" wells.

On May 27, 1959, the Commission on its own motion took notice of the above situation and issued an order to Northern to show cause why it should not take ratably from the wells to which it is connected in the Hugoton field in

Kansas. The hearing was set first on June 26, 1959, but later continued to July 24, 1959, and the order appealed from was issued October 7, 1959.

At the hearing before the Commission, an expert witness testified as follows:

> ". . . I have expressed an opinion that there is drainage occurring. Our studies indicate that if the wells are produced with the same percent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected. There are two ways of accomplishing this currently in the Hugoton Field. One is to raise the total (of) Northern Natural's takes up until they are ratable with the Republic 'A' group, and second would be to lower Republic 'A' by curtailing their production, so they will become ratable with the balance of the field."

We do not read the record to show that there is any contention but that drainage was occurring, and that the underproduced wells were losing the right to produce gas from the common source of supply to the great damage of the owners of the wells in the loss of their correlative rights.

While the members of this court make no claim to be experts in the science of the production of natural gas, we believe that the court may take judicial notice of the fact that where natural gas is within the earth in one common source and is under pressure, if one gas well is allowed to take gas, this will result in the pressure being lowered around the vicinity of this gas well so that the gas in the common source will tend to drain or rush to the vicinity of the well taking gas. The result will be that the other wells in the common field or source will be able to produce much less gas and the owners of such wells will have suffered a definite loss.

[fol. 157] It should be noted at this time that shortly after the issuance of the order of the Commission dated October 7, 1959, directed only to Northern and which is appealed from in this present proceeding, the Commission, after due notice and hearing, issued a general rule ap-

plicable to all takers of natural gas from the Hugoton gas field requiring that all takers of gas take ratably from the wells to which they are connected. Northern's appeal from that general order is to be found in *Northern Natural Gas Co.* v. *State Corporation Commission,* 188 Kan. ——, —— P. 2d ——.

In attempting to sustain its position in the present case, Northern first contends that our state Natural Gas Act does not provide for ratable taking; that the act applies only to producers of gas; that Northern is a purchaser of gas and a natural gas company engaged in interstate commerce. It refers to section 55-703, G. S. 1959 Supp., and stresses the first part of the section which refers to producers. But Northern has ignored the latter part of the section wherein the following language is found:

> "The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent."

In Summers on *Oil and Gas,* Vol. 1A, sec. 103.1 p. 139, wherein the eminent author is dealing with ratable taking of oil and gas, that part of section 55-703 set out above is noted and the author concludes as follows:

> "The Kansas gas conservation act authorizes the state corporation commission to so regulate the taking of gas from any common source of supply as to prevent inequitable and unfair taking. This act does not expressly state that purchasers of gas in the common source of supply may be required to take ratably from

all wells with which their pipe lines may be connected, *but unless the commission has such authority it cannot prevent inequitable and unfair taking.*" (Italics supplied.)

It will be noted that the Commission is authorized to make rules and regulations for the purpose of accomplishing the results to which the Commission is directed; and that such rules and regulations have the force and effect [fol. 158] of law when filed in the office of the revisor of statutes (G. S. 1949, 77-410).

In search of Commission's Rule 82-2-101, which has been so filed, we find the following: "Taker: See purchaser." And in the same rule, purchaser is defined as follows:

> "Purchaser shall mean any person who directly or indirectly purchases, transports, takes, or otherwise removes production to his account from a well, lease or common source of supply. Purchaser is usually considered to be the person holding the division order." (Italics supplied.)

We believe Northern is mistaken in arguing that the above statute and the rules made thereunder do not apply to a purchaser of natural gas. We are only more convinced that the legislature had this in mind, by the fact that natural gas cannot be produced unless someone is ready to buy it, it cannot be stored in a tank on the lease. Therefore, as Professor Summers says, the object of the quoted provisions of section 55-703 cannot be accomplished unless the taker or purchaser can be controlled. We believe the statute is sufficient to reach Northern.

We note that in its brief, the Commission has directed attention to certain language in the opinion of *Republic Natural Gas Co.* v. *State Corporation Commission*, supra. While the whole opinion in that case is in line with what we are now deciding, the precise question now before us was not there involved.

The second objection to the validity of the order of the Commission appealed from is sweeping in its coverage and reads as follows:

"II

"Said order as approved by the trial court is arbitrary, unreasonable and discriminatory, has no relation to proration or conservation of gas, burdens interstate commerce and takes appellant's property and contract rights, all in violation of the commerce clause, the contract clause and the fourteenth amendment to the federal constitution, and the Kansas Bill of Rights, sections one, two and eighteen, and section seventeen, article two of the Kansas constitution."

Despite the sweeping indictment of the order, Northern really seems to simply argue that the contract has established the correlative rights of the parties, and that therefore, the state is powerless to prevent waste and drainage of gas as long as the monthly allowables are not unlawfully exceeded.

We would direct attention to a provision of the contract upon which Northern relies, and which reads:

[fol. 159] "SECTION 2. *Commission Jurisdiction.* This contract is subject to all valid legislation with respect to the subject matter hereof, either State or Federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction."

We cannot agree with the argument that the monthly allowable is the whole story. Certainly, the wells attached to Northern and apart from Republic "A" are losing gas to Republic "A" and possibly to any other taker who is taking gas at a greater rate than Northern is allowing gas to be produced from these wells.

It would seem that ratable taking in the production of natural gas has been late in coming before this court for approval. The Supreme Court of Oklahoma upheld an order of the Corporation Commission of that state providing that a purchaser of natural gas must take gas from a producer having no contract with the purchaser and must also take ratably from the aforesaid producer: see *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203

Okla. 35, 220 P. 2d 279, affirmed on appeal, 340 U. S. 179, 95 L. Ed. 190, 71 S. Ct. 215.

It would appear to us that the opinions of the Supreme Court of Oklahoma and of the Supreme Court of the United States in the above case foreclose any of Northern's arguments in the case at bar. There was a matter of contract inovlved in the Peerless case. Cities Service undoubtedly thought they had a right to take gas from the wells from which it had contracted to buy gas, and that it had no duty to contract with Peerless. But it was held that the state might prevent drainage of gas from the Peerless wells despite the contracts held by Cities Service.

Certainly, in view of the above quoted provision of the contract between Northern and Republic, there has been no impairment of the obligation of contract in this case or any other impairment of constitutional right.

Lastly, Northern contends that the order of the Commission impinges upon the authority of the Federal Power Commission under the Natural Gas Act, 15 U. S. C. A. § 717 *et seq.*

As above noted, we are quite well aware that Northern is engaged in the transportation and sale of natural gas in interstate commerce by pipe line. We do not believe, however, that the matters dealt with in this case affect interstate transportation or sale in any respect. That is, the matters dealt with in this case pertain to "production and gathering of natural gas." (15 U. S. C. A. § 717(b)). [fol. 160] It should again be emphasized that the Commission's order did not direct Northern as to the amount of gas which it should take, it only directed that the amount Northern needs shall be taken ratably from all the gas wells which Northern serves. Northern agrees that it could do this, but says it would have to give up its contracted preference to Republic "A" wells. Everyone would be happy if Northern would take the entire monthly allowable from all of the wells served. Northern says that in the near future it believes that it will be able to do this very thing.

We believe that the state may regulate the production of natural gas and the gathering of the same to the extent

necessary to insure that the gas under one owner's land will not be drawn off by his neighbor, and that his neighbor cannot plead a contract with a third person to give him a right to drain gas from his neighbor.

All of the matters contained in Northern's brief have been fully considered, and we find that the order appealed from must be affirmed. It is hereby so ordered.

SCHROEDER, J. (dissenting): The Commission by its order directed to Northern assumes it has authority under G. S. 1949, 55-703, as amended, to control and regulate *purchases* of gas by Northern, engaged in the interstate transportation of gas. This, in my opinion, is beyond the authority of the statute.

What the Commission in the instant case (No. 42,128), and in the companion case (No. 42,127), purports to do is to set up one proration system, having application to *purchasers*, within a proration system controlling *production* under the Basic Order for the Hugoton Gas Field adopted on the 21st day of March, 1944, *which was designed and declared by the Commission to "accomplish the purposes for which article 7, chapter 55, General Statutes of Kansas for 1935 was enacted."* (Basic Proration Order for the Hugoton Gas Field, paragraph m.) (Emphasis added.)

By the Commission's order dated October 7, 1959, Northern was directed to take gas ratably from its connections in the Kansas Hugoton Gas Field (Case No. 42,128), and by the Commission's order promulgating Rule 8-2-219 (Case No. 42,127), all companies *purchasing gas* from a common source of supply under proration by the Commission are required to take gas in proportion to the allowables from all the wells to which each is connected.

The Basic Proration Order for the Hugoton Gas Field, [fol. 161] as amended, and in effect at times material, by a system of proration, controls the *production* of gas in the Hugoton Field. The end sought in fixing *production quotas* was to enable each developed lease to currently produce its daily allowable so that ultimately such developed lease would have an opportunity to produce approximately the amount of gas which underlies such lease.

It recognized the available production of the wells in the Hugoton Field was far in excess of the market demand, and found:

> "f. That since there exists disproportionate *production* from the wells and leases in said field which impairs the correlative rights of many of the owners of developed leases, it is necessary for the Commission to take jurisdiction and to prescribe *regulations for the production of gas* from said wells and others that may be hereafter completed in said field to the end that each person, firm, or corporation *having the right to drill into and produce natural gas from said field may take therefrom only such proportion of the amount that may be produced therefrom without waste* as will permit each well or developed lease *to produce* ultimately at least approximately the amount of gas underlying the land or lease on which such well is located and *currently produce proportionately* with the other wells in said fields . . ." (Emphasis added.)

The basic order adopted a formula which was said to have a reasonable relation to the prevention of waste, to the prevention of inequitable and unfair *production of gas from the common source of supply*, and to the prevention of unreasonable discrimination in favor of one *producer* in said field and against another *producer* therein (paragraph m). The order directed that there be held two market demand hearings for each year (paragraph n) to determine the market demand for natural gas from the Hugoton Field for the next succeeding proration periods, and directed the preparation and promulgation of a new schedule of *production* allowable for the wells in said field, *based upon the determination made as a result of the market demand hearing* (paragraph o).

The record presented discloses that pursuant to paragraph "n" of such basic proration order, two market demand hearings for each year were and are held by the Commission, and market demand orders were and are issued for six-month periods (October 1 to March 31 and April 1 to September 30), in addition to which *monthly*

proration or allowable orders were and are issued for each month spreading and allocating the market demand and fixing the monthly allowables assigned to each of the producing gas wells in said field.

The record discloses that for the entire period from April, 1944, through February, 1958, there were no im- [fol. 162] portant differences between the ratable purchases by Northern from Republic "A" wells and other wells to which it was connected. The difference in ratio was less than one times the January allowable for essentially the entire period.

However, in the spring of 1958, a wide difference in Northern's purchases appears between the Republic "A" wells and the others.

The reason stated to the Commission and assigned by Northern for this difference is:

> ". . . First, as the Commission is well aware, *allowables granted by the Commission to the field have exceeded the total field production by approximately 130 billion cubic feet* and the wells connected to Northern, other than the Republic 'A' wells, have become substantially underproduced. Second, is the fact that Northern has been seriously delayed in expanding its system into new markets for gas by reason of the failure of the Federal Power Commission to issue the necessary Certificates of Public Convenience and Necessity. . ." (Emphasis added.)

Testimony on behalf of Northern was that given sufficient time it would be able to conduct its operations in such a way that the taking from the wells to which it was connected would be ratable. This was based *on the assumption that the Commission's future allowable assignments will be realistic,* and on the further assumption that the necessary expansion certificates will be issued to Northern by the Federal Power Commission.

It must be recognized that Northern's Republic "A" contract is subject to all valid legislation with respect to gas purchases in the Hugoton Field, either state or federal, and to all valid present and future orders, rules and regu-

lations of duly constituted authorities having jurisdiction. (See, *Northern Natural Gas Co. v. Republic Natural Gas Co.*, 172 Kan. 450, 478, 241 P. 2d 708.)

The testimony on behalf of Northern was that as far as facilities were concerned, it was not physically impossible for Northern to take gas ratably from the Republic "A" wells and all other wells connected to its system. The evidence further disclosed that if the markets were sufficient so that Northern could take the current allowables from the Republic "A" wells and also take the current allowables from all other wells connected to it, then Northern's take would be ratable as between all wells connected to its system. In other words, *when the market conditions are at the same level as the allowables then the same return of take would exist between the Republic "A" wells and all other wells to which Northern was connected.*

[fol. 163] Theoretically, when these facts are considered, in the light of the Basic Proration Order for the Hugoton Field and the statute pursuant to which it was promulgated, if the Commission is not derelict in its duty *to correlate allowable production with the market demand*, all wells of necessity would be *produced* ratably without supplementation by any order or rule to control the *purchasers* of gas in the Hugoton Field. Taking into consideration the entire history of Northern's purchases of gas in the Hugoton Field starting from April, 1944, the above theory seems to have practical application.

It is readily apparent that any effort to control the purchase of gas, which of necessity on the facts before the court in the instant case is limited to those wells connected to Northern's gathering system and pipe line, cannot protect the correlative rights of all producers from the common source of supply in accordance with the mandate of the statute. It fails to take into consideration those wells, potentially capable of production, which have no market for their gas, and the differential in markets among the various purchasers of gas from the common source of supply. Therefore, if the Commission fails to exercise its power *to correlate production with demand*, it cannot ac-

complish the mandate of the statute, and resort to a method which requires *the purchasers* of gas in the Hugoton Field to take ratably from the wells to which each is connected is little more than a futile gesture.

It must be assumed the legislature was aware of the situation regarding the production and development of gas in this state when 55-703, *supra*, was first enacted in 1935, and when subsequent amendments were made thereto, but it did not expressly authorize the Commission to require purchasers of gas in the common source of supply to take ratably from all wells to which their pipe line was connected. It undoubtedly felt the control of production was sufficient to accomplish the purposes for which the statute was enacted.

An analysis of G. S. 1949, 55-703, as amended, (now G. S. 1959 Supp., 55-703) will disclose the Commission has no jurisdiction over purchases of gas by an interstate pipe line company. Our gas conservation law is Chapter 55, Article 7, and is entitled "PRODUCTION AND CONSERVATION OF NATURAL GAS." The applicable section of this statute is 55-703, *supra*. In pertinent part it reads:

[fol. 164] "[1] Whenever the available *production* of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, *then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced* without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said

common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. [2] The commission shall so *regulate the taking of natural gas from any and all such common sources of supply* within this state as to prevent the *inequitable or unfair taking from such common source of supply* by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and *in favor of or against any producer* in any such common source of supply . . ." (Emphasis and numbers added.)

In both cases the Commission relies upon the above quoted portion of the statute marked [2], categorically stating this is the source of its jurisdiction.

An examination of this portion of the statute, and those portions thereof which have been italicized, makes it clear that *the taking referred to,* over which the Commission is to have regulatory jurisdiction under certain circumstances, *is from the common source of supply.* As applied to the Kansas Hugoton Gas Field the common source of supply would be the so-called "Hugoton Pay Zone," or the producing horizon described as gas encountered at an average depth of from 2700 to 2800 feet below the surface within the Kansas Hugoton Gas Field. Therefore, the taking referred to is not a taking from the wellhead, or from a producer, or from the end of a gathering system owned by the producer some miles from the wellhead, but the taking referred to is from the common source of supply.

It must be noted the phrase "person, firm or corporation" used in both the first and second portions of the quoted statute, is defined in the first portion as one "*having the right to produce natural gas.*" (Emphasis added.) It is difficult to believe the legislature intended that on the one hand such expression referred to a producer, and on the other hand to a purchaser.

[fol. 165] The court in *White Eagle Oil Co.* v. *State Corporation Comm.*, 168 Kan. 548, 214 P. 2d 337, quotes a portion of the first sentence of the section of the statute

in question which it construes as being the statutory mandate or declaration of public policy with regard to *production*.

While the Commission's general rules and regulations, in Rule 92-2-101, under the definition of "taker" refers the reader to the definition of "purchaser," the rules do not give the Commission jurisdiction to regulate purchases, unless such authority is found in the statute. In other words, if the statute does not confer power upon the Commission to regulate the purchases of gas, it cannot confer such power upon itself by the adoption of a rule.

The State Corporation Commission of Kansas has a limited jurisdiction. It possesses no powers not given it by statute. (*Bennett* v. *Corporation Commission*, 157 Kan. 589, 596, 142 P. 2d 810; *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, 80 L. Ed. 528, 56 S. Ct. 397; 24 Am. Jur., Gas and Oil, § 144, p. 628; and see, *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 77 L. Ed. 1410, 53 S. Ct. 768.)

On those several occasions over the life of the statute when this court has been called upon *to construe* 55-703, *supra*, and its companion sections, it has consistently construed such act as a statute giving authority to regulate production, and not purchases. (*Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, supra; and *Republic Natural Gas Co.* v. *State Corporation Commission*, 173 Kan. 172, 244 P. 2d 1196.)

In *Republic Natural Gas Co.* v. *State Corporation Commission*, supra, the court in substance said that the continuing duty on the part of the Commission was to cause the *production* of gas from any well to be ratable, in accordance with the provisions of the statute and the basic order; and that no operator or producer had any vested right to produce from any well more gas in any month than was assigned it as its allowable, the entire matter of *producing gas* from a well being subject to the provisions of the basic order and the statute. In other words, under 55-703, *supra*, to "take" gas means to "produce" gas. The essence of the gas conservation statute is that it operates on the operator or producer of the well.

In construing our oil conservation statute, which is very similar to our gas conservation statute, this court in *State*

ex rel., v. *Sinclair Pipe Line Co.*, 180 Kan. 425, 304 P. 2d 930, stated:

> "The statutes with reference to waste are G. S. 1949, 55-601 to 55-608, inclusive. The production of crude oil in such a manner as to constitute waste is pro- [fol. 166] hibited by G. S. 1949, 55-601, and made a crime by G. S. 1949, 55-607. *The statute refers only to production.* Sinclair, as we have demonstrated, is engaged strictly in interstate transportation of crude oil. The Oklahoma statute on waste is almost identical to ours. In speaking of that statute, the supreme court of the United States held in *Champlin Rfg. Co. v. Corporation Commission*, 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559:
>
> "'It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products.'" (pp. 437, 438.) (Emphasis added.)

It is significant to note that the oil statute, G. S. 1949, 55-603, states in part: "... *any person having the right to drill into and produce* oil therefrom may *take* therefrom ..." (Emphasis added.) (See, Two Cases on Conservation, Vol. 6, J. B. K. p. 149, by H. H. Lesar.)

It is apparent that heretofore the Commission itself has always construed the statute in question as one authorizing the regulation of production, and not purchases. In paragraph "f" of the Basic Proration Order for the Hugoton Gas Field the Commission found "The present and past *production* from the wells in said field is and has been *inequitable* and *unfair*." (Emphasis added.) At another place in paragraph "f" the Commission found "it is necessary for the Commission to take jurisdiction and to prescribe regulations for the *production* of gas." (Emphasis added.)

In *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 203 Okla. 35, 220 P. 2d 279, the Oklahoma Supreme Court directed Cities Service, a purchaser of gas to take gas ratably from other wells in a given field. From this decision the

Commission argues that ratable take statutes do in fact apply to purchasers as well as producers.

It must be noted in the state of Oklahoma the legislature has enacted a *common purchasers' statute*, requiring that purchasers of gas shall purchase and transport natural gas from each person or producer ratably, in proportion to the average production, and prohibits such common purchasers from discriminating in price or amount for like grades of natural gas or facilities as between producers or persons. (52 Okl. St. Ann. § 23.) Also, the legislature of Oklahoma in its conservation of oil and gas *statute* has defined the term "taker" to include a purchaser of natural gas as follows:

> "(i) The term 'Taker' shall include any person, who, acting alone, or jointly with any person or persons, is directly or indirectly purchasing or transporting by any means whatsoever or otherwise removing oil or gas from any common source of supply in this State. Laws 1947, p. 326, § 1." (52 Okl. St. Ann. § 86.1.)

[fol. 167] It is clear the Kansas Corporation Commission cannot look to the statutes of other states, or to the judicial construction of such statutes, for power to control purchasers of gas in Kansas under the provisions of G. S. 1949, 55-703, as amended.

Both the statute and the Basic Proration Order for the Hugoton Gas Field purport to give the Commission jurisdiction over the regulation of production only. In other words, the "taking" which must be ratable under the statute and the basic order is the *production* of gas from the common source of supply, not the *purchasing* of gas. By a mandatory direction from the legislature the Commission has jurisdiction over production, so that such production will neither be inequitable nor unfair. The "Order" (Case No. 42,128) and the "Rule" promulgated by the Commission (Case No. 42,127) here under review which is directed to purchasers, rather than operators or producers, and seeking to regulate the purchase of gas, or the manner of making such purchases after production has ceased, rather than to regulate the production itself, are in my opinion invalid

because they go beyond the jurisdiction conferred upon the Commission by the statute.

[fol. 168] [File endorsement omitted]

No. 42,128

IN THE SUPREME COURT OF THE STATE OF KANSAS

NORTHERN NATURAL GAS COMPANY, a corporation, Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Appellee.

Appeal from the District Court of Finney County, Kansas.
Honorable Roland H. Tate, Judge

NORTHERN NATURAL GAS COMPANY'S MOTION FOR REHEARING—Filed June 30, 1961

Appellant, Northern Natural Gas Company, after a careful review and consideration of this Court's opinion, decision and judgment entered in the above captioned appeal, does hereby respectfully move this Honorable Court to set aside its said opinion, decision and judgment, entered and filed herein on June 10, 1961, to grant appellant a rehearing thereof and upon such rehearing or otherwise to set aside the purported ratable take order directed at appellant, and modify its judgment herein by construing G.S. 1949, 55-703, as amended by the legislature in 1959, as exclusively a statute relating to the production of gas and not to the purchase thereof, so that such construction by this Court will not result in a conflict with or impinge upon or invade the jurisdiction of the Federal Power Commission under the provisions of the Natural Gas Act, 15 U.S.C.A. 717, thereby avoiding the consequences resulting [fol. 169] from any attempt by the State of Kansas to rega-

late in any manner sales of gas in interstate commerce for resale and natural gas companies, parties to such sales.

The real issue here is whether our Kansas statute, G.S. 1949, 55-703, as amended,[1] in addition to requiring *ratable production* of gas from the common source of supply within reasonable and practical tolerances also requires *ratable purchases* of gas.[2] There would be no question about the jurisdiction of the Kansas Commission to require producers under such law to produce ratably and thereby accomplish the purposes of the statute. Obviously, if producers are restricted in their production so as to require it to be ratable with other producers within reasonable and practical tolerances, then there is no problem with respect to whether or not any purchaser purchases ratably. While the Kansas Commission thus could legally and within its jurisdiction require ratable production, if the statute is construed, as it is by the present decision of the Court in this case, to reach over into and attempt to control sales of such gas in interstate commerce for resale, then immediately the effect of the Court's decision is to transgress on the jurisdiction of the Federal Power Commission.

The resulting issue accordingly before this Court under this motion deals directly with a clash of jurisdiction be- [fol. 170] tween the Federal Power Commission and the Corporation Commission of Kansas, which conflict can be avoided by confining the Kansas Corporation Commission's jurisdiction exclusively to the production of gas, and when

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[1] Appellants respectfully call the Court's attention to the fact that the statute referred to, construed and quoted from in the majority opinion was G.S. 1949 55-703. This statute, however, was amended in 1959 and at all times material hereto the statute with which the Court should be concerned is G.S. 1959 Supp. 55-703.

[2] Despite the statement by the Court to the contrary, (See page 5 of the opinion) Northern has never contended that the statute is not a ratable take statute. Northern's position, however, was and is that clearly the statute was intended to give the State Corporation Commission jurisdiction only over the production and conservation of natural gas and not over the purchaser after production has ended. The Court's error in this respect was in interpreting the word "taker" as being synonomous with "purchaser".

such is done ratable production and ratable purchasing of gas (within reasonable and practical tolerances) will of necessity result.

The order in this case (Abs. 68-70) is specifically directed to Northern Natural Gas Company, which the Court concedes in its opinion is a purchaser and transporter of natural gas in interstate commerce for resale from the Kansas Hugoton Field. The Court takes the position that the order in question is a valid exercise of the police powe of the state on the ground that it pertains to the production and gathering of natural gas and by reason thereof comes within the exemption provisions of the Natural Gas Act. There is a fundamental anomaly here because the record is clear that Northern is not a producer of gas but is rather only a purchaser and transporter of such gas.

In the next to the last paragraph of the Court's opinion it is said:

> "We believe that the state may regulate the *production* of natural gas and the gathering of the same to the extent necessary to insure that the gas under one owner's land will not be drawn off by his neighbor, and that this *neighbor* (Republic) cannot plead a contract with a *third person* (Northern) to give him a right to drain gas from his *neighbor*. (Abutting landowner.)"

No one can justify an objection to this statement of the Court because it does pertain to the production and conservation of natural gas under G.S. 1949, 55-703, as it was amended by the legislature in 1959. Objection does, however, stem from the fact that this Court has applied the statute not to the production of gas, but rather to the sale of gas, such sale being for transportation and resale in interstate commerce.

[fol. 171] This Court, appellant believes, should not be led astray and allow itself to be inveigled by the Corporation Commission into this wholly unnecessary clash with the provisions of the Natural Gas Act. There appears to appellant to be no sound reason for construing this statute in question to authorize the Commission to regulate the sale of gas when regulation of production would suffice

and accomplish the objective of the legislature under the statute as heretofore construed by this Court. *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708.

The Court bases its decision on the construction applied to the statute by the author of Summers on Oil and Gas, Vol. 1A, Section 103.1, Page 139, upon Corporation Commission rule 82-2-101, which deals exclusively with the oil conservation statutes and pertains in no way to the gas production and conservation statutes, and upon the case of *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Oklahoma 33, 222 P. 2d 279, as affirmed on appeal, 340 U. S. 179, 95 L. Ed. 190.

In so doing the Court completely overlooks and disregards the fact that the authorities relied upon by it in no way give consideration to the plain provisions of the Natural Gas Act, 15 U.S.C.A. 717. In Section 717 (a), it is provided:

> "• • • it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that *federal regulation* in matters relating to the transportation of natural gas and the sale thereof in interstate • • • commerce is necessary in the public interest."

Paragraph (b) of this same section provides:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate consumption for domestic, commercial, [fol. 172] industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply • • • to the production or gathering of natural gas."

It is to be noted that the plain provisions of the Natural Gas Act concern and relate to "federal regulation" and "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of

natural gas for resale * * * and to natural gas companies engaged in such transportation or sale, * * * ".

This Court completely overlooks the use of the words "federal regulation". Apparently this Court felt that the cases heretofore before this Court relating to the *fixing* of the price of natural gas sold in interstate commerce for resale are not here applicable. The word "regulate" certainly does not have such a limited meaning as to be applicable only to the *fixing* of a price for natural gas.

The Supreme Court of the United States, in *Dayton-Goose Creek R. Co.* v. *United States*, 263 U.S. 478, 68 L.Ed. 398, had occasion to consider the meaning of the word "regulate" as it pertained to the interstate commerce clause. In the opinion Mr. Chief Justice Taft, speaking for the Court, said:

> "It was insisted in the two cases referred to, and it is insisted here, that the power to *regulate* interstate commerce is limited *to the fixing of reasonable rates* and the prevention of those which are discriminatory and that, when these objects are attained, *the power of regulation is exhausted.*"

The Court then said:

> "This is too narrow a view of the commerce clause. *To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.*" (Citing many cases)

[fol. 173] That the word "regulate" is limited to the fixing of a price for natural gas sold in interstate commerce is certainly too narrow a construction of such word. The word "regulate" is much broader and covers the sale of gas in all its aspects when such sale is a sale in interstate commerce for resale. The Supreme Court of the United States, in *Natural Gas Pipe Line Co. of America* v. *Panoma Corp.*, 349 U.S. 44, 99 L.Ed. 866, gave the Natural Gas Act no such narrow construction. While the case pertained to

the fixing of a minimum price to be paid for such gas the Court in the opinion said:

> "We held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L.Ed. 1035, 74 S.Ct. 794, that *such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission. The Phillips case, therefore, controls this one.*
>
> "We disagree with the contention of the appellees that Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 95 L.Ed. 190, 71 S.Ct. 215, and Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190, 95 L.Ed. 204, 71 S.Ct. 221 are applicable here. *In those cases we were dealing with constitutional questions and not with the construction of the Natural Gas Act. The latter question was specifically not passed upon in those cases.* Reversed." (Emphasis supplied)

It is, therefore, clear from the Panoma case that the jurisdiction of the Federal Power Commission under the Natural Gas Act is not merely limited to the fixing of the price of gas sold in interstate commerce for resale, but includes the regulation of the whole sale thereof in all respects.

This Court in this case has not drawn the line of demarcation between the production of gas, and the sale and purchase thereof. In other words, this Court in this case is doing exactly the same thing that it attempted to do in *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P. 2d 528, which the Supreme Court [fol. 174] of the United States summarily reversed in a one sentence per curiam opinion, 355 U.S. 391, 2 L.Ed. 2d 355. On pages 461-462 of the state court opinion, this Court endeavored to justify the Commission price order on the ground that it pertained to the production and gathering of natural gas and not to the purchase or sale thereof. After the Supreme Court of the United States had reversed this Court's decision, this Court, in *Cities Service Gas Co.* v. *State Corporation Commission*, 184 Kan. 540, 337 P. 2d

640, had occasion again to consider Commission's minimum gas price fixing order in face of the decision of the United States Supreme Court holding such order to be a nullity. In the latter case this Court, in reviewing the order for a second time, clearly demonstrated that at the time of its first decision it was not unmindful of the decision of the United States Supreme Court in *Natural Gas Pipe Line Co.* v. *Panoma Corporation*, supra, nor was it not cognizant of the warning given by the United States Supreme Court in the case of *Cities Service Gas Co.* v. *Peerless Oil and Gas Co., supra.* On page 543 of the opinion this Court said:

> "Despite all of these warnings and considerations, this court in its former decision in this case felt that in view of the provisions of the Natural Gas Act, the state still had a right to use the fixing of a minimum price at the wellhead *as a means of conservation in the production of natural gas.*". (Emphasis supplied.)

On the next page of the opinion (544) this Court further said:

> "In reviewing this holding, we understand the Supreme Court of the United States to hold that on January 1, 1954, the State of Kansas had *no jurisdiction to regulate* the price of natural gas as it came out of the well since that price would affect interstate commerce and the jurisdiction of the Federal Power Commission." (Emphasis supplied.)

Certainly this Court should not again allow the Corporation Commission, even though it is an arm of the state government, to draw this Court into deciding that such Commission has any jurisdiction of any kind or character over the sale of natural gas in interstate commerce for resale. [fol. 175] See *Saturn Oil & Gas Company* v. *Federal Power Com'n.*, 250 F. 2d 61, certiorari denied, 355 U.S. 956, 2 L. Ed. 2d 532, where wellhead sales in the Kansas Hugoton Field were involved. There the Court when considering the contended for exemption under the "production and gathering" clause in the Natural Gas Act defined production as "the act of bringing forth gas from the earth" and gathering as

"the act of collecting gas after it has been brought forth from the earth" (page 64). The Court in holding that the wellhead sales involved were sales in interstate commerce for resale stated that until there is a sale of the natural gas produced by such operations and installations in interstate commerce for resale, they are exempt, *however*, if there is such a sale the jurisdiction of the Federal Power Commission applies. The Court thus concluded that such sales at the wellhead in the Kansas Hugoton Field were exclusively in the jurisdiction of the Federal Power Commission.

It seems to this appellant that this court should fully recognize the full impact of the United States Supreme Court's decision in the Phillips case. To appellant that Court made it clear that not only the sale and purchase of gas in interstate commerce for resale were under the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act, but also that the producer as well as the purchaser with respect to such sale were "natural gas companies", as defined in the Natural Gas Act.

In *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 677, 98 L.Ed. 1035, 1045, the Supreme Court of the United States said:

> "They (petitioners) contend, however, that the affirmative grant of jurisdiction of such sales (sales in interstate commerce for resale) in the first clause of Section 1 (b) (Natural Gas Act) is limited by the negative second clause of the section. In particular, the conten- [fol. 176] tion is made that the sales by Phillips are a part of the 'production or gathering of natural gas' which the Commission's jurisdiction expressly does not extend.
>
> "We do not agree. In our view, the statutory language, the pertinent legislative history and the past decisions of this Court all support the conclusion of the Court of Appeals that Phillips is a 'natural gas company' within the meaning of that term as defined in the Natural Gas Act, and *that its sales in interstate commerce of natural gas for resale are subject to the jurisdiction of and regulation by the Federal Power Commission.*"

On pages 681 and 682 the Court further said:

> "The cases discussed above supply a ready answer to the determination of the Commission and also to petitioner's suggestion that 'production or gathering' should be construed to mean the 'business' of production and gathering, *with the sale of the product considered as an integral part of such 'business'*. We see no reason to depart from our previous decisions, especially since they are consistent with the language and legislative history of the Natural Gas Act. Rather, we believe that the legislative history indicates a Congressional intent to give the Commission (FPC) jurisdiction over the rates of all wholesalers of natural gas in interstate commerce, whether by pipe line company or not and whether occurring before, during or after transmission by an interstate pipe line company." (Emphasis supplied.)

It, therefore, is clear that the Supreme Court of the United States, in interpreting the provisions of the Natural Gas Act, has squarely determined that the Federal Power Commission, under the Act, has *exclusive jurisdiction to regulate sales of natural gas in interstate commerce for resale, regardless of where the sale occurs* and the specific provisions of Section 1 (b) of the Act covering production or gathering of natural gas do not give the state authority or jurisdiction to regulate the sale of such gas or the purchaser thereof on the ground that same is a part of production or gathering.

In *Deep South Oil Company of Texas* v. *Federal Power Commission* (C.A. 5, 1957), 247 F. 2d 882, the Phillips case [fol. 177] was considered. It was there said, at pages 888 and 889 of the opinion:

> "The petitioner alternatively contends, however, that regardless of whether the sales in question are sales in interstate commerce, the transactions fall within the clause of Section 1 (b) of the Act which specifically excepts from the Commission's jurisdiction the regulation of '* * * the production or gathering of natural gas.' We do not at all agree, but on the contrary think

that our observations in Interstate Natural Gas Company v. Federal Power Commission, 156 F. 2d 949, 951, supply a ready answer to this contention. There, in speaking of Section 1 (b), we said:

"'(The Act) is very simply and plainly written: After stating what it shall apply to, it then states what it shall not apply to. Under familiar rules of construction, a negation in or exception to a statute will be construed so as to avoid nullifying or restricting its apparent principal purpose and the positive provisions made to carry them out. * * * Here the statute was drawn to regulate, it picked out for inclusion "sale in interstate commerce of natural gas for resale for ultimate public consumption". * * * Unnecessarily perhaps but in the interest of making clear that the act gave jurisdiction only over sales and transportation of the kind described in it, it used language removing from any doubt that the Commission was not to have jurisdiction over properties used for production and local distribution or the activities of production and gathering. It did this by expressly providing that the act should not apply "to the facilities used for such (i.e. local) distribution or to the production or gathering of natural gas".'

"The exemption of production and gathering merely means that the physical activities, facilities and properties used by petitioner in the production and gathering of natural gas are not within the commission's power of regulation. *However, there is nothing in the Act which suggests, either expressly or by implication, that by the exemption of production and gathering, Congress intended that the wholesale sales of natural gas in interstate commerce which are consummated before the gas has been gathered or processed should not be regarded as sales in such commerce over which the Commission was granted exclusive jurisdiction to regulate.*' (Emphasis supplied.)

In short the Court points out very clearly that the exemption in the Natural Gas Act does not apply to sales of natural

gas in interstate commerce which are consummated before the gas has been gathered or processed. There is absolutely [fol. 178] nothing sacrosanct with respect to orders of the Corporation Commission, particularly when such orders are directed to a purchaser of gas where the sale to it is made in interstate commerce for resale of which the State Commission has no jurisdiction.

Why then should this Court construe G.S. 1949, 55-703, as amended, to sustain an order of the Corporation Commission directed to a party and covering subject matter of which it has no jurisdiction when it could readily construe such statute as applying only to the production of gas which is under the jurisdiction of the Corporation Commission of this State?

The statute, coupled with the provisions of the basic proration order for the Kansas Hugoton Field, is fully adequate to justify this Court to determine that the Corporation Commission of this State under G.S. 1949, 55-706, 55-708 and 55-709, may enforce the ratable production of gas in the Kansas Hugoton Field or any other field within its jurisdiction without the necessity of any special or general order requiring purchasers of gas to take and purchase gas ratably.

Mr. Justice Schroeder, in the first paragraph of his dissenting opinion in this case, challenges this Court's attention to the distinction existing between production of gas and the purchase and sale thereof by there saying:

> "The Commission by its order directed to Northern assumes it has authority under G.S. 1949, 55-703, as amended, to control and regulate purchases of gas by Northern, engaged in the interstate transportation of gas. This, in my opinion, is beyond the authority of the statute."

Mr. Justice Schroeder could well have used in lieu of the word "statute", supra, the word "state". Apparently as disclosed by the dissenting opinion, Mr. Justice Schroeder preferred to base his dissent on a construction of G. S. 1949, 55-703 as amended, rather than to see this [fol. 179] Court clash again with the Supreme Court of the

United States and the plain provisions of the Natural Gas Act as interpreted and construed by that Court.

If this Court would hold the Commission ratable take order invalid since the statute, as amended, obviously applies only to the production and not to the sale of gas in interstate commerce for resale, its decision would conform not only to the objective of the legislature but to the subsisting provisions of the basic proration order for the Kansas Hugoton Field as fully explained by Mr. Justice Schroeder in his dissenting opinion. Where, however, the Court applies the statute as it has done in this case to the sale and purchase of gas, the Court runs squarely afoul of the provisions of the Natural Gas Act.

From the record in this case, the operations of Northern Natural Gas Company are solely those incident to the purchase of gas for transportation in interstate commerce for resale subject to the jurisdiction of the Federal Power Commission. Northern only becomes a "purchaser" because of a "sale" having been made to it. The Federal Power Commission jurisdiction extends to and covers that sale. Such sales are the first sales after production has ended. The true objective of our statute relating to "production and conservation of gas" can be fully met and accomplished by the State Commission's regulation of production. For all of the reasons and by virtue of the authorities heretofore referred to, rehearing should be granted herein, the Court's previous decision set aside, and decision rendered holding invalid the Kansas Commission's Order complained of.

Respectfully submitted,

Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, Mark H. Adams, II, John S. Seeber, Floyd E. Jensen, Joe Rolston, 503 Colorado-Derby Building, Wichita, Kansas; Lawrence I. Shaw, F. Vinson Roach, Patrick J. McCarthy, 2223 Dodge Street, Omaha, Nebraska; Ray H. Calihan, Logan N. Green, Daniel R. Hopkins, Ray H. Calihan, Jr., 118 West Pine, Garden City, Kansas, Attorneys for Appellant, Northern Natural Gas Company.

[fol. 180] Acknowledgment of Receipt of Appellant's Motion for Rehearing and Waiver of Formal Proof of Service Thereof (omitted in printing).

[fol. 181]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,128

NORTHERN NATURAL GAS COMPANY, Appellant,

v.

STATE CORPORATION COMMISSION, Appellee.

OPINION DENYING MOTION FOR REHEARING—
Filed August 31, 1961

Appeal from Finney district court; ROLAND H. TATE, judge.

(For original opinion of affirmance see ante p. 355, 362 P. 2d 599.)

[fol. 182] The opinion of the court was delivered by

JACKSON, J.: In its motion for rehearing Northern disclaims the position of contending that our gas statute G. S. 1959 Supp. 55-703 does not require ratable production of gas from a common source. It says the question is whether the statute also requires ratable purchases of gas. It then warns the court not to invade the jurisdiction of the Federal Power Commission by dealing with purchasers, citing *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L.Ed. 1035; *Natural Gas Co.* v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576; *Deep South Oil Co. of Texas* v. *Federal Power Com'n.*, 247 F. 2d 882; *Saturn Oil & Gas Company* v. *Federal Power Com'n.*, 250 F. 2d 61, cert. denied 355 U.S. 956, 2 L.Ed. 2d 532, 78 S. Ct. 542; *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P. 2d 528, reversed 355 U. S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381; and *Cities Service Gas Co.* v. *State Corporation Commission*, 184 Kan. 540, 337 P. 2d 640.

We had read those cases before the opinion in this case was announced, and we believe those cases all dealt with the question of the power to regulate the price of gas. As we tried to point out in the opinion as filed, this case in no way involves the price of gas. Northern studiously avoids that fact. Moreover, the ratable taking order does not regulate the total amount of gas which Northern may take. We fail to see how the order affects interstate commerce in any way.

Northern magnanimously states that the state may control the ratable production of natural gas, but fails to inform us how this can be done unless the producer can find a "taker" for his gas.

It is not important in this case that the purchaser has a contract to purchase the gas at a price, which we will assume is subject to the regulation and jurisdiction of the Federal Power Commission, but the only important matter [fol. 183] is that the "taker" take gas so that it may be produced. This case involves nothing to our knowledge which has anything to do with the price paid by the purchaser for gas, nor how much gas he buys. The only matter here involved is whether the taker must take ratably from all wells to which he is connected and thus preserve the rights of the land owners.[1] We again refer to the statement of Professor Summers of the University of Oklahoma School of Law set out in the original opinion to show that ratable production cannot be accomplished unless the taker will take gas ratably.

Northern has in this case cast some reflection upon the increase of allowables in 1958 by the Kansas Commission. The record contains no facts concerning this action of the Commission. But we must assume that the Commission believed that the market was sufficient to warrant the increase. Moreover, if we are justified in taking judicial notice of facts, we must also assume that the Kansas allowables were not greater than the Oklahoma allowables. And

[1] Reference might again be made to that part of G.S. 1959 Supp. 55-703 which is quoted in the original opinion and to the discussion in the late case of *Rayl* v. *Monsanto Chemical Co.*, 187 Kan. 158, p. 170, 354 P.2d 3[illegible], relating to the proration and ratable taking as to oil.

we notice that it was generally thought to be a fact that drainage of gas was occurring from the Kansas Hugoton field to that part of the field in Oklahoma.

Thus, in 1958, the Commission may have been, in a round about way, endeavoring to set up ratable taking as between Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells.

Of course, none of this is involved in the record of the case before us. However, we may direct attention to the news story on page 54, in *Newsweek* for July 10, 1961, entitled *Natural Gas: Two Straws*. It is there noted that the Hugoton field covers some 4.1 million acres in Kansas, Oklahoma and Texas; that most of the estimated 300 trillion cubic feet of gas in the field lies under Kansas soil, but that Oklahoma supplies the major share of the 2 million cubic feet pumped daily northward through the pipe lines.

The motion for rehearing is denied.

[fol. 184] Schroeder, J., is of the opinion the judgment of the trial court should be reversed, and therefore dissents.

[fol. 185]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 42,128

NORTHERN NATURAL GAS COMPANY, a Corporation, Appellant,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—November 17, 1961

I.

Notice is hereby given that Northern Natural Gas Company, a Corporation, the appellant above named,

hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, the highest court of such state, affirming the judgment of the District Court of Finney County, Kansas, upholding and sustaining the validity of an order issued by the Corporation Commission of the State of Kansas directing appellant to take gas ratably from all wells to which it is connected in the Kansas-Hugoton Gas Field, which judgment was entered in this action on the 10th day of June, 1961, and became final on the 31st day of August, 1961, by that Court's opinion denying appellant's motion for rehearing.

This appeal is taken pursuant to 28 U.S.C.A. 1257(2), [fol. 186] 62 Stat. 929.

II.

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. Abstract of record as prepared and filed by appellant, including any Appendix thereto, together with the proof of service thereof;

B. Counter abstract of record as prepared and filed by appellee, including any Appendix thereto, together with the proof of service thereof;

C. Opinion, decision and judgment of the Supreme Court of Kansas entered June 10, 1961, including the dissenting opinion of Mr. Justice Schroeder;

D. Appellant's motion for rehearing as filed, together with proof of service thereof;

E. Opinion, decision, and judgment of the Supreme Court of Kansas entered August 31, 1961, denying appellant's motion for rehearing, including dissenting opinion; and

F. This notice of appeal, together with proof of service thereof.

III.

The following Federal question is presented by this appeal:

Does the State of Kansas have jurisdiction, under the guise of regulating production and in the face of the provisions of the Natural Gas Act and Federal Power Commission regulations thereunder, to control the sale of natural gas in interstate commerce for resale after the production and gathering thereof has ended, by directing a natural gas company purchaser, operating under subsisting gas sales contracts with its producers, to make its purchases in a manner or at a rate contrary to such con- [fol. 187] tracts which are on file with the Federal Power Commission as effective rate schedules and on which Certificates of Public Convenience and Necessity authorizing such sales have been issued?

Dated this 17th day of November, 1961.

Mark H. Adams,* Mark H. Adams, II, Joe Rolston, 503 Colorado Derby Building, Wichita, Kansas; Lawrence I. Shaw, F. Vinson Roach, Jack C. Osborne, Patrick J. McCarthy, 2223 Dodge Street, Omaha, Nebraska, Attorneys for Appellant, Northern Natural Gas Company.

---

* Attorney upon whom service should be made.

Acknowledgment of Service (omitted in printing).

[fol. 188] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 189]

SUPREME COURT OF THE UNITED STATES

No. 659, October Term, 1961

NORTHERN NATURAL GAS COMPANY, Appellant,

vs,

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS.

Appeal from the Supreme Court of the State of Kansas.

ORDER NOTING PROBABLE JURISDICTION—May 28, 1962

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Frankfurter and Mr. Justice White took no part in the consideration or decision of this case.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

Nos. [redacted] 62

NORTHERN NATURAL GAS COMPANY,
a corporation,
Appellant,

VERSUS

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

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December, 1961.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-8780

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

Nos. .....

NORTHERN NATURAL GAS COMPANY,
a corporation,
Appellant,

VERSUS

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

Appellant appeals from two final judgments of the Supreme Court of Kansas that upheld as valid two orders and a rule issued by the Corporation Commission of that State, which, under the guise of controlling the ratable production of natural gas, had the operational effect of regulating appellant's purchases of gas for transportation and sale in interstate commerce for resale. Accordingly, appellant, as authorized by paragraph 3 of Rule 15 of this Court, submits herewith this single jurisdictional statement covering both such appeals.

OPINIONS BELOW

The opinion of the Kansas Supreme Court in Case No. 42,128 is reported in 188 Kan. 355, 362 P.2d 599.[1] Such Court's opinion denying rehearing in this case is reported in 188 Kan. 624, 364 P.2d 668.[2] No opinion was rendered by the District Court.[3] The order of the Kansas Corporation Commission involved in this case is unreported but is attached hereto as Appendix D.

The opinion of the Kansas Supreme Court in Case No. 42,127 is reported in 188 Kan. 351, 362 P.2d 609.[4] Such Court did not render an opinion in denying rehearing in this case. The District Court did not render an opinion herein.[5] The order and rule issued by the Kansas Corporation Commission are not reported but are set forth in Appendix G attached hereto.

JURISDICTION

These actions were brought by appellant in the District Court of Finney County, Kansas, under G.S. 1949, 55-707,[6] to review and set aside two orders and a rule issued by the Kansas Corporation Commission. The jurisdictional background of such actions, which were desig-

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[1] Also attached hereto as Appendix A.

[2] Also attached hereto as Appendix B.

[3] The Judgment entered by the District Court is attached hereto as Appendix C.

[4] Also attached hereto as Appendix E.

[5] The Judgment of the District Court is attached hereto as Appendix F.

[6] See Appendix H hereto.

nated Case No. 42,128 and Case No. 42,127 in the Kansas Supreme Court, is as follows:

Case No. 42,128

This case deals with the validity of an order (Appendix D) of the Kansas Commission dated October 7, 1959, directing this appellant "to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field," but which order, in reality, was one regulating, under the guise of accomplishing ratable production of gas, appellant's purchases of gas in said field for transportation and sale in interstate commerce for resale. (Said Commission order was rescinded on February 8, 1960, after the Commission issued its order and rule which is the subject matter of the action in Case No. 42,127.) The District Court on April 8, 1960, entered judgment (Appendix C) affirming said order of the Kansas Commission. Motion for new trial was overruled on April 27, 1960. By opinion (Appendix A) filed June 10, 1961, the Kansas Supreme Court, with one Justice dissenting, affirmed the judgment of the District Court. Such Supreme Court, with the same Justice dissenting, denied appellant's motion for rehearing on August 31, 1961 (Appendix B). Notice of appeal was filed in the Kansas Supreme Court on November 17, 1961.

Case No. 42,127

This case deals with the validity of an order and accompanying rule (Appendix G) issued by the Kansas Commission, effective February 8, 1960, directing each purchaser of gas in each common source of supply under proration in Kansas to "take gas in proportion to the

allowables from all the wells to which it is connected," but which order and rule, in reality, constituted the regulation of appellant's purchases of gas for transportation and sale in interstate commerce for resale under the guise of accomplishing the ratable production of natural gas in such common sources of supply. Such order and rule were affirmed by the District Court of Finney County, Kansas, on April 8, 1961 (Appendix F) and motion for new trial was overruled on April 27, 1961. The judgment of the District Court was affirmed by the Kansas Supreme Court, one Justice dissenting, in an opinion filed June 10, 1961 (Appendix E), and on September 19, 1961, the Kansas Supreme Court denied (without opinion) appellant's motion for rehearing. Notice of appeal was filed in the Kansas Supreme Court on November 17, 1961.

The jurisdiction of the Supreme Court of the United States to review the decisions and judgments of the Kansas Supreme Court is conferred by 28 U.S.C.A., §1257(2), 62 Stat. 929.

Decisions sustaining the jurisdiction of the Supreme Court to review the judgments in these cases are as follows:

—*Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035;

Natural Gas Pipeline Co. v. *Panoma Corp.*, 349 U.S. 44, 75 S. Ct. 576, 99 L. Ed. 866;

Cities Service Gas Co. v. *State Corporation Commission of Kansas*, 355 U.S. 391, 78 S. Ct. 381, 2 L. Ed.2d 355.

STATUTE INVOLVED

In Case No. 42,128 in the Kansas Supreme Court, the Kansas Corporation Commission order[7] under review was dated October 7, 1959, and provided:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field."

In Case No. 42,127 in the Kansas Supreme Court, the Kansas Corporation Commission order and rule[8] under review were issued effective February 8, 1960, and such rule ordered:

> "Rule 82-2-219
>
> "RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY
>
> "In each common source of supply under proration by this Commission, *each purchaser shall take gas* in proportion to the allowables *from all the wells to which it is connected* and shall maintain all such wells in substantially the same proportionate status as to over production or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of well to produce proportionately with other wells connected to the purchaser. (Authorized by G.S. 1959 Supp. 55-703; Effective February 8, 1960.)" (Emp. added).

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[7] See Appendix D.

[8] See Appendix G.

The Kansas statute, G.S. 1959 Supp., 55-703,[9] upon which the orders and rule were based provides, in pertinent part, as follows:

> "Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply."

Statutory and constitutional provisions upon which appellant relies for reversal of the judgments herein are

[9] Set forth in full in Appendix I hereto

pertinent provisions of the Natural Gas Act, 15 U.S.C.A. §717, *et seq.*, 52 Stat. 821, *et seq.*, and, the Constitution of the United States, clause two of Article VI.

QUESTION PRESENTED

Does the State of Kansas have jurisdiction, under the guise of regulating production and in the face of the provisions of the Natural Gas Act and Federal Power Commission regulations thereunder, to control the sale of natural gas in interstate commerce for resale after the production and gathering thereof has ended, by directing a natural gas company purchaser, operating under subsisting gas sales contracts with its producers, to make its purchases in a manner or at a rate contrary to such contracts which are on file with the Federal Power Commission as effective rate schedules and on which certificates of public convenience and necessity authorizing such sales have been issued?

STATEMENT

Appellant, Northern Natural Gas Company,[10] is a corporation engaged in the business of purchasing natural gas for transportation and sale in interstate commerce for resale for ultimate public consumption and is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act, 15 U.S.C.A. §717a (R. 31-32, 73-74, 154, 159, 182, No. 42,128; R. 37, 78-79, 89-190, No. 42,127). Northern is not a producer of natural gas. (R. 44, 157-158, No. 42,128; R. 50, 100, No. 42,127). The Kansas Hugoton Gas Field

[10] Hereinafter referred to as "Northern."

has been one of Northern's most important sources of gas supply from the formation of the company to the present time (R. 32, 38, 40-41, No. 42,128; R. 37, 43, 45-46, No. 42,127).[11] Northern's initial contract for gas supply in such field was dated May 27, 1930, and was between predecessors in interest of Northern and Republic Natural Gas Company.[12] On December 21, 1945, Northern and Republic entered into a new contract (hereinafter referred to as the Republic "A" Contract) superseding the original contract and amendments thereto. This contract, as subsequently amended, covers the sale of gas by Republic to Northern from approximately 144 wells in the Kansas Hugoton Gas Field (R. 33, No. 42,128; R. 38-39, No. 42,127).

Under the Republic "A" contract, as amended, as under the prior contract dated in 1930, certain maximum and minimum quantities of gas are specified for sale and purchase between the parties (R. 34-37, No. 42,128; R. 39-43, No. 42,127). The Kansas Supreme Court, in the case of *Northern Natural Gas Co. v. Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708,[13] determined that Northern should regulate its purchases from the Republic "A" wells so that at the end of each contract accounting year it will have purchased therefrom the volume of gas Republic is entitled to produce and deliver to Northern under valid Kansas Corporation Commission proration orders for that particu-

---

[11] There are six other major purchasers of gas from this field (R. 75, No. 42,128; R. 80, No. 42,127).

[12] Hereinafter referred to as "Republic."

[13] Such opinion was filed March 8, 1952, more than two years prior to Federal Power Commission Orders series 174, requiring Federal Power Commission certification of sales and service to be rendered pursuant to such contract.

lar year (such volumes will hereinafter be referred to as the "legal allowables" of the Republic "A" wells). Since such court decision, Northern has endeavored to purchase the legal allowables of the Republic "A" wells during each contract year (R. 39, No. 42,128; R. 44-45, No. 42,127).

Beginning in 1938 Northern contracted to buy additional gas supply in the Kansas Hugoton Gas Field from various producers. Northern currently has about 125 gas purchase contracts with producers in said field under which approximately 1,100 wells have been connected to Northern's gathering system in such field (R. 40-41, No. 42,128; R. 45-46, No. 42,127).[14] All of such contracts provide that Northern shall purchase gas ratably from the wells thereunder with all other wells, except the Republic "A" wells, connected to its system in the Kansas Hugoton Field. All of such contracts specifically exempt the volume Northern is obligated to purchase from the Republic "A" wells in determining each seller's ratable production under each such contract.[15]

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[14] Under Federal Power Commission Orders series 174 such gas sales contracts were filed as rate schedules with the Federal Power Commission and certificates by it issued authorizing the sales and service contemplated thereunder (R. 42, No. 42,127).

[15] The ratable purchase provision of Northern's contract with Cities Service Oil Company dated September 9, 1949, is typical of all of Northern's other contracts in the Kansas Hugoton Gas Field and provides, in pertinent part, as follows:

> "*Section 3. Northern's Obligation to Purchase Gas.*
>
> (a) *Ratable Purchase of Gas.* Northern agrees to purchase and receive from Seller hereunder, subject to the provisions of subparagraphs (b) • • • of this Section 3, gas produced from any common source of supply underlying the acreage described • • • ratably (without discrimination) with all natural gas purchased and produced by Northern from the same common source of supply situated in the Kansas portion of the Hugoton Gas Field • • •.

From 1944, the date of initial proration of production in the Kansas Hugoton Gas Field, until 1958, there was no important difference between Northern's purchases from the Republic "A" wells and other wells connected to its system in said field. Northern's purchases from all wells to which it was connected were substantially ratable as between such wells in such field over reasonable periods of time (R. 49-52, No. 42,128; R. 54-57, No. 42,127). In the spring of 1958, however, a material difference developed in this respect. Such difference resulted from two factors. First, the Kansas Corporation Commission by its market demand orders had, since 1956, granted allowables to the wells in this field of approximately 130 billion cubic feet in excess of the total field production (R. 162, No. 42,128).[15] Secondly, Northern had been seriously delayed in expanding its system to new markets by reason of failure in securing the necessary certificates of public convenience and

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[15] (Continued)

(b) *Prior Obligations.* This contract is made expressly subject to the obligations of Northern under the following gas purchase contracts, and the volumes of gas which Northern is obligated to purchase thereunder, plus such reasonable volumes of gas as Northern may take in excess of said volumes in order to avoid any penalty which might accrue for failure to take the volumes Northern is obligated to purchase * * *.

* * * * * *

(ii) The Gas Purchase Contract dated December 21, 1945, as now or hereafter amended or revised, with Republic Natural Gas Company, or any new contract which supersedes said contract of December 21, 1945. (R. 42-44, No. 42,128; R. 47-49, No. 42,127).

[16] The validity of such Kansas Commission orders is being contested in numerous cases docketed and pending in the Supreme Court of Kansas, including those numbered 41515, 41516, 41585 and 41586.

necessity from the Federal Power Commission (R. 52, No. 42,128; R. 57, No. 42,127). Since Northern was obligated to and did purchase the legal allowables from the Republic "A" wells, the action of the Kansas Commission in fixing the high allowables plus the failure to connect anticipated new markets resulted in substantial underproduction accruing to wells other than the Republic "A" wells connected to Northern's system in the Kansas Hugoton Field (R. 53, 55, No. 42,128; R. 58, 60, No. 42,127).

On May 27, 1959, the Kansas Corporation Commission issued an order requiring Northern to show cause why it should not purchase gas ratably from all wells to which it is connected in the Kansas Hugoton Field (R. 29-30, No. 42,128; R. 34-36, No. 42,127). After conclusion of the hearing on said show cause order, the Kansas Commission issued its order dated October 7, 1959, whereby Northern was required to purchase gas ratably from all of such wells. It is this order (rescinded on February 8, 1960) which was involved in Case No. 42,128 in the Kansas Supreme Court (R. 71-73, 82-87, 154, No. 42,128).

On November 12, 1959, the Kansas Commission initiated proceedings for the adoption of a rule to require all purchasing companies to purchase gas ratably from all wells to which they are connected in the same common source of supply in the State of Kansas (R. 30-31, No. 42,127). The record before such Commission in Case No. 42,128 was incorporated into this proceeding (R. 32-34, No. 42,127). After further hearings, the Kansas Commission on February 3, 1960, issued an order promulgating Rule 82-

2-219 requiring each purchaser in any common source of supply under proration to "take" (i.e., purchase) gas from all wells to which it is connected in proportion to the allowables thereof and to maintain all such wells in substantially the same proportionate status as to overproduction and underproduction (R. 94-98, No. 42,127) (Appendix G). It is this order and rule which were involved in Case No. 42,127 in the Kansas Supreme Court (R. 180, No. 42,127).

How the Federal Question is Presented

In its petitions for judicial review in the District Court of Finney County, Kansas, in the instant cases, Northern alleged as grounds for reversal the identical reasons which it had placed before the Kansas Corporation Commission in its petitions for rehearing of the Commission's orders. Northern alleged that said orders and rule were unlawful, illegal, unconstitutional, beyond the jurisdiction of said Commission and void among others, because they purport:

> "* * * to strike down and amend the express provisions in all of petitioner's gas purchase contracts in the Kansas Hugoton Gas Field by which all producers selling gas to petitioner have agreed to the apportionment of Northern's gas requirements amongst them, thereby (a) casting an unlawful burden upon, impairing and impeding the interstate operations of petitioner in the purchase, transportation and sale in interstate commerce of natural gas for resale taken by petitioner from said Kansas Hugoton Gas Field in violation of the commerce clause of the United States, (b) in impairment of and contrary to the exclusive jurisdiction of the Federal Power Commission under the subsisting provisions of the Natural Gas Act, 15

U.S.C.A. 717, *et seq.*, and etc. in impairment of the obligations of such gas purchase contracts in violation of Section 10 of Article I of the Constitution of the United States." (R. 7, No. 42,128; R. 7, No. 42,127).

After Northern was denied relief in the District Court, it again raised the same federal constitutional and statutory issues in its appeals to the Kansas Supreme Court. Such latter court specifically passed upon the federal questions raised by Northern and denied the validity of same. In the syllabus prepared by the Court in Case No. 42,128 it summarized its holdings as follows:

> "It is further decided that such an order as described in the first paragraph hereof did not impair the obligation of a contract possessed by the purchaser or impinge upon other constitutional rights of the purchaser.
>
> "It is also further decided that the order of the Commission as to the equitable taking of natural gas concerns only the production and gathering of gas and in no way impairs the control of the Federal Power Commission over the transportation of natural gas in interstate commerce under the federal Natural Gas Act, 15 U.S.C.A. 717, *et seq.*" (R. 152, No. 42,128).

In discussing the case of Northern's Motions for Rehearing, the Kansas Supreme Court had this to say with respect to the federal questions raised herein:

> "* * * It [the statute] * * * [omitted] that the statute also requires reasonable purchases of gas. It then warns the court not to invade the jurisdiction of the Federal Power Commission by dealing with purchasers. * * *." (Bracketed word added).

"We fail to see how the order affects interstate commerce in any way. * * *"

"It is not important in this case that the purchaser has a contract to purchase the gas at a price, which we will assume is subject to the regulation and jurisdiction of the Federal Power Commission, *but the only important matter is that the 'taker' take gas so that it may be produced.* * * *" (Emp. added.) (R. 182-183, No. 42,128.)

THE QUESTIONS ARE SUBSTANTIAL

These cases bring before this Court serious questions concerning the power of a state to interfere with and impose its requirements on the purchasing operations of an interstate natural gas pipeline company whose activities, including the manner in which it purchases natural gas under executed contracts with gas-producers, are subject to comprehensive control by the Federal Power Commission under the provisions of the Natural Gas Act. The purpose and objective of these state regulations is quite clear. It is nothing less than to force Northern to increase its purchases of gas from the wells to it connected in the Kansas Hugoton Gas Field beyond the amount of gas it requires therefrom to satisfy its interstate markets and in excess of its contractual obligations to producers to it connected in such field.[17] If Northern fails to comply with such regulations it submits itself to severe penalties (G.S. 1949, 55-708, 709, and 710). On the other hand, Northern's

[17] The Kansas Supreme Court acknowledged [illegible] denying rehearing in Case No. 42128, it said:

"Thus, in 1958, the Commission may have been, in a round about way, endeavoring to set up ratable taking as between

interstate market requirements from the field are such that it cannot comply with such state regulations without running the risk of threatened lawsuits for millions of dollars by Republic Natural Gas Company, as producer, under a theory that Northern has not met its contractual obligations to purchase gas from wells belonging to such producer. Although promulgated by the State under the guise of regulating the production of natural gas, these state regulations clearly and directly control sales and service of gas committed to and actually moving in interstate commerce for resale.

The resolution of these questions will have a far-reaching effect on the natural gas industry as a whole. If the Federal Power Commission function is to protect adequate service to ultimate consumers in the interstate markets of the respective pipe line companies, it must have jurisdiction to regulate such service at the source as well as at the end of interstate transmission. Certainly, it has been assumed in line with *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, and subsequent decisions, that sales of natural gas in interstate commerce for resale by producers, and perforce the purchase thereof by interstate pipeline companies, after production and gathering has ended, were beyond the power

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17 (Continued)

Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells." (R. 183, No. 42,128.)

In view of the Kansas Supreme Court's citation in the aforesaid opinion denying rehearing, of the July 10, 1961 *Newsweek* article, appellant has attached such article as Appendix B(a) hereto. Although there are many gross misstatements of fact in such article, the fact that it was cited and referred to in such opinion accurately reflects the attempt of the State of Kansas to require purchasers to increase their purchases of Kansas Hugoton gas.

of the state to control. If this assumption is erroneous, it is imperative that all segments of this vital industry be so advised.

The Natural Gas Act Grants to the Federal Power Commission exclusive jurisdiction over the regulation of the sale of natural gas in interstate commerce for resale in all its aspects.

As this Court is well aware, Congress in enacting the provisions of the Natural Gas Act evidenced an intent to provide for a comprehensive and effective regulatory scheme. *Panhandle E. Pipe Line Co. v. Public Serv. Com.*, 332 U.S. 507, 520, 68 S. Ct. 190, 197, 92 L. Ed. 128. To that end Congress specifically charged the Federal Power Commission with the responsibility of regulating, under Sections 1, 4, 5, and 7 of the Natural Gas Act, the transportation and sale in interstate commerce of natural gas for resale for ultimate public consumption and natural gas companies engaged in such transportation or sale while, at the same time, leaving to the states certain areas of responsibility, such as the drilling and spacing of wells and the like.[18]

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[18] *Colorado Interstate Gas Co. v. Federal P. Com.*, 324 U.S. 581, 602-603, 65 S. Ct. 829, 89 L. Ed. 1206. Similarly, a state may determine common sources of supply of oil and gas, require production separately from separate producing formations found within the common well bore, and restrict the commingling of production therefrom, restrict the production from developed leases for purposes of conservation and protection of correlative rights, provide means for proper measurement of production, require well completion in such a manner as to protect fresh water strata and prevent the intrusion of salt water into producing formations, control secondary methods of recovery, waterflooding, etc.

One of the questions presented by these appeals is whether the State of Kansas has jurisdiction, in the face of the provisions of the Natural Gas Act and the Federal Power Commission regulations thereunder, to require a natural gas company purchaser after production and gathering has ended, to increase its purchases of gas for transportation and resale in interstate commerce or face possible contractual liability, by directing such company to make its purchases in a manner or at a rate contrary to its gas sales contracts theretofore filed with and approved by the Federal Power Commission and on which certificates of public convenience and necessity authorizing such sales were issued.

From 1954 to date, the decisions of this Court and all other federal courts have clearly indicated that the area of activity attempted to be regulated by the State of Kansas herein is subject to the exclusive jurisdiction of the Federal Power Commission and that the state is powerless to enforce its edicts with respect thereto. On June 7, 1954, this Court, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682-684, 74 S. Ct. 794, 799, 800, 98 L. Ed. 1035, said with respect to the Federal Power Commission's authority to regulate "sales" of natural gas in interstate commerce for resale under the Natural Gas Act:

> "* * * we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline com-

> pany. * * * Thus, we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems."

In 1955, in the case of *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, 75 S. Ct. 576, 99 L. Ed. 866, the question was whether Oklahoma could fix a minimum price to be paid for natural gas, after its production and gathering is ended, by a company which transports the gas for resale in interstate commerce. In concluding that the state was powerless to so fix the price, this Court said:

> "We held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794, that such a sale and transportation cannot be regulated by a state but are subject to the *exclusive regulation* of the Federal Power Commission." (Emp. added.)

In 1958, this Court reversed decisions of the Kansas and Oklahoma Supreme Courts holding that the state had authority to fix minimum prices for natural gas sold in interstate commerce for resale where such sale occurred at or near the wellhead of the producer's well. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 78 S. Ct. 381, 2 L. Ed.2d 355; *Phillips Petroleum Co.* v. *Corporation Commission of the State of Oklahoma*, 355 U.S. 425, 78 S. Ct. 409, 2 L. Ed.2d 412.

15 U.S.C.A. 717(a), 52 Stat. 821, specifically declares:

> "* * * that *Federal regulation* in matters relating to the transportation of natural gas and the *sale thereof in interstate and foreign commerce is necessary in the public interest.*" (Emp. added.)

The clear import of this Court's recent decisions construing the Natural Gas Act is that a sale of gas in interstate commerce for resale is subject to *the exclusive regulation* of the Federal Power Commission. The Supreme Court of Kansas, in its opinion denying appellant's motion for rehearing, fully recognizes and states that it has read these recent cases, but that Court understands this Court's cases to deal only "with the question of the power to *regulate the price of gas*" (R. 182, No. 42,128) (Emp. added.) That Court has apparently not given recognition to the meaning of the word "regulate" as defined by this Court long ago in *Dayton-Goose Creek R. Co. v. United States*, 263 U.S. 456, 478, 44 S. Ct. 169, 68 L. Ed. 388, 398. It is there said, with respect to the meaning of the word "regulate" as it pertained to the commerce clause:

> "It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited *to the fixing of reasonable rates* and the prevention of those which are discriminatory, and that, when these objects are attained, *the power of regulation is exhausted.*" (Emp. added.)

This is exactly the same position the Kansas Supreme Court has taken in construing the recent opinions of this Court dealing with the regulation of a sale of gas in interstate commerce for resale. The fallacy of the Kansas Supreme Court's reasoning is pointed up clearly in the *Dayton-Goose Creek* case, *supra*, where this Court said:

> "This is too narrow a view of the commerce clause. *To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned,*

as well as the public at large, and to promote its growth and insure its safety." (Citing many cases) (Emp. added.)

To paraphrase the language of this Court just quoted appellant here asserts that:

"To regulate a sale of gas in interstate commerce for resale in the sense intended by the Natural Gas Act and this Court's construction thereof is to foster, protect and control the sale of gas in all its aspects. Otherwise, not only the interests of those immediately concerned but the ultimate public consumer as well, will not be protected and the safety and growth of interstate commerce insured."

In 1961, in the case of *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1, 81 S. Ct. 435, 5 L. Ed.2d 377, 390, in interpreting the Natural Gas Act with respect to the jurisdiction of the Federal Power Commission thereunder as opposed to possible state regulatory authority, this Court said:

"* * * Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. Compare Guss v. Utah Labor Relations Board, 353 U.S. 1, 77 S. Ct. 698, 699, 1 L. Ed. 2d 691. That is to say, in a borderline case where congressional authority is not explicit, we must ask whether state authority can practically regulate a given area and, if we find that

it cannot, then we are impelled to decide that federal authority governs."[19]

In view of this Court's explicit holding in the *Natural Gas Pipeline Co.* case, *supra*, that the Federal Power Commission has exclusive jurisdiction to regulate "a sale and transportation," the "no man's land" of regulations has been occupied and the question has already been resolved contrary to the holding of the Kansas Supreme Court in these cases which should of necessity lead to a review and reversal of such Kansas court decisions by this Court. *C.f., Michigan Consol. Gas Co. v. Panhandle Eastern Pipe L. Co.*, 173 F.2d 784, 789.

Thus this Court has definitely determined that the authority of the state to regulate commerce in natural gas does not extend to *any* aspect of a sale where such sale is in interstate commerce for resale.

In the face of the numerous decisions of this Court and other federal courts cited herein, the Kansas Supreme Court in these cases has held (R. 159, No. 42,128):

> "As above noted, we are quite well aware that Northern is engaged in the transportation and sale of natural gas in interstate commerce by pipe line. We do not believe, however, that the matters dealt

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[19] Similarly in two certificate cases, *Sun Oil Company v. Federal Power Commission*, 364 U.S. 170, 80 S. Ct. 1388, 4 L. Ed. 2d 1639 and *Sunray Mid Continent Oil Co. v. FPC*, 364 U.S. 137, 80 S. Ct. 1392, 4 L. Ed. 2d 1623, this Court made it clear that all the terms and provisions—not merely the pricing sections—of the contracts between independent producers and interstate pipeline companies covering sales of gas in interstate commerce for resale are subject to the jurisdiction of the Federal Power Commission once the service contemplated has been initiated.

> with in this case affect interstate transportation or sale in any respect. That is, the matters dealt with in this case pertain to 'production and gathering of natural gas.' [15 U.S.C.A. §717 (b).]"[20]

If the Kansas Supreme Court had examined the decisions construing 15 U.S.C.A. §717(b), it would have easily ascertained that the matters dealt with in these appeals *do not* pertain to the production or gathering of natural gas. In no less than six cases[21] the courts have said that the production and gathering exemption applies only to the physical activities, facilities and properties used in the production and gathering of natural gas. When a sale in interstate commerce for resale is being made, the exemption *cannot* apply. This conclusion has never been more succinctly stated than in the opinion of the District Court in the *Huber* case (133 F. Supp. 479, 482, fn. 3):

> "In short, as the words are used in Section 1(b) a sale in interstate commerce for resale can never be part of the producing and gathering process."

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[20] It should again be emphasized that Northern does *not* contend the State cannot regulate the physical production of gas, before the sale in interstate commerce for resale.

[21] *Colorado Interstate Gas Co. v. Federal P. Com.*, 324 U.S. 581, 65 S. Ct. 829, 89 L. Ed. 1206; *Interstate N. G. Co. v. Federal Power Com.*, 331 U.S. 682, 67 S. Ct. 1482, 91 L. Ed. 1742, *Federal Power Commission v. Panhandle E. P.L. Co.*, 337 U.S. 498, 69 S. Ct. 1251, 93 L. Ed. 1499; *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035; *Deep South Oil Co. of Texas v. Federal Power Com'n.*, 5th Cir., 247 F.2d 882; *Saturn Oil & Gas Company v. Federal Power Com'n.*, 10th Cir., 250 F.2d 61.

Lower federal courts have had numerous occasions to apply the law enunciated by this Court in the above cited decisions. As expected, all of such courts have uniformly held that the Federal Power Commission has exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. They have likewise consistently held that, where such a sale is involved, the "production or gathering" exemption of 15 U.S.C.A. 717(b) does not oust the Federal Power Commission of jurisdiction to regulate such sales. See, *e.g.*, *Federal Power Commission* v. *J. M. Huber Corporation*, 133 F. Supp. 479; *J. M. Huber Corporation* v. *Federal Power Commission*, 3rd Cir., 236 F.2d 550; *Deep South Oil Co. of Texas* v. *Federal Power Com'n.*, 5th Cir., 247 F.2d 882; *Saturn Oil & Gas Company* v. *Federal Power Com'n.*, 10th Cir., 250 F.2d 61; *Continental Oil Company* v. *Federal Power Commission*, 5th Cir., 266 F.2d 208.

The all-inclusive jurisdiction of the Federal Power Commission over gas sales contracts between natural gas companies and services to be rendered thereunder includes the exclusive jurisdiction to modify the terms thereof relating to services, thereby assuring protection of the consuming markets [15 U.S.C.A. 717(c)].

Since production is the "act of bringing forth gas from the earth," *Saturn Oil & Gas Company* v. *Federal Power Com'n*, 10th Cir., 250 F.2d 61, 64, it is clear that production is completed prior to the sale of the gas by the producer to Northern. This being true, it necessarily follows that the Kansas Commission orders and rule approved by the Kansas Supreme Court herein pertain to

the sale and purchase of gas and not to the production and gathering thereof.

The adverse effects which the orders and rule herein, if permitted to stand, will have on the operations of Northern and other pipeline purchasers is manifest. As heretofore noted, the Kansas Hugoton Gas Field is, and has been for the past thirty years, one of Northern's most important sources of gas supply. If Northern does not obey such orders and rule, it is subject to heavy penalties under the Kansas statutes. On the other hand, if it does obey such orders and rule it is threatened with suits by Republic Natural Gas Company for money in substantial amounts for alleged breach of contract, since Northern's interstate markets are not sufficient to enable it to purchase the allowable from the wells under the Republic "A" contract and also the allowable under its other 125 contracts in this field.

The applicable principle that should govern this Court in its determination of the reviewability of the final judgments of the Supreme Court of Kansas in these appeals, in conjunction with the recent decisions of this Court cited herein holding that the sale of gas in interstate commerce for resale is under the exclusive regulation of the Federal Power Commission, is well stated by this Court, in the recent case of *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125, decided November 14, 1960. It is there said, on page 117 of L. Ed.2d:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over

when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, viz., that '*Acts generally lawful may become unlawful when done to accomplish an unlawful end, United States* v. *Reading Co.*, 226 U.S. 324, 357, 57 L. Ed. 243, 254, 33 S. Ct. 90; *and a constitutional power cannot be used by way of condition to attain an unconstitutional result.*' Western U. Tel. Co. v. Foster, 247 U.S. 105, 114, 62 L. Ed. 1006, 1016, 38 S. Ct. 438, 1 A.L.R. 1278." (Emp. added.)

The state objectives sought to be accomplished by the orders and rule were not conservation and/or protection of correlative rights through the ratable taking of gas as approved by this Court in *Cities Serv. G. Co.* v. *Peerless O. & G. Co.*, 340 U.S. 179, 185-186, 71 S. Ct. 215, 95 L. Ed. 190. What the Kansas Commission sought by these orders and rule was to force Northern to increase its purchases of gas from the common source of supply, specifically the Kansas Hugoton Gas Field. These appeals are not analogous to the *Peerless* case, *supra*, *e.g.*, no contract there existed. That case dealt with Cities Service as a producer and operator of an interstate gas pipe line system. Northern, however, is not a producer in the field but only a purchaser. Further, the *Peerless* case, *supra*, did not involve a consideration of the provisions of the Natural Gas Act.

As pointed out by MR. JUSTICE SCHROEDER, 188 Kan. 362, what the Corporation Commission in these cases,

> "• • • purports to do is to set up one proration system, having application to *purchasers*, within a proration system controlling *production* under the Basic Order for the Hugoton Gas Field adopted on the 21st day of March, 1944, *which was designed and declared by the Commission to 'accomplish the purposes for which article 7, chapter 55, General Statutes of Kansas for 1935 was enacted'.*" (R. 160, No. 42,128)

That is to say, the Commission, already having in existence under the basic order for the Kansas Hugoton Gas Field a proration system controlling production, decided that it would set up another proration system having application not to producers but to natural gas company purchasers within said field.

Clearly, the Kansas Commission actions were in violation of the provisions of the Natural Gas Act and in contravention of the decisions of this Court construing the same, which determined that the exclusive jurisdiction to regulate such a sale in all its aspects is lodged in the Federal Power Commission.

That both orders and rule are leveled directly at Northern, there can be no doubt, irrespective of the fact that the rule itself is cast in general terms (R. 92, 102, No. 42,127). The Kansas Commission was well aware of Northern's contractual obligations to Republic Natural Gas Company. Evidence and testimony fully expository thereof were considered by the Commission in promulgating its order directed to Northern dated October 7, 1959. The

record in such proceeding was incorporated in full in the docket in which the Kansas Commission promulgated its rule effective February 8, 1960, and rescinded the earlier order (R. 32-34, No. 42,127).

The Kansas Commission has granted allowables to the Kansas Hugoton Gas Field in excess of total field production by approximately 130 billion cubic feet and the wells in such field connected to Northern, other than the said Republic "A" wells, have been substantially under-produced because Northern simply does not have the inter state markets for gas from such field to permit it to purchase and receive the amount of gas from this field that the Kansas Commission has demanded.

Armed with the knowledge that Northern was obligated to purchase and receive the legal allowables from the Republic "A" wells, the Kansas Commission thought it saw an opportunity to force Northern to receive increased sales from such field by requiring it to purchase ratably amongst all of the wells to it connected therein.

The question presented, including subsidiary questions fairly comprised and discussed herein, becomes more acute and substantial so as to require plenary consideration by this Court of briefs covering the merits of these appeals, when it becomes fully cognizable to this Court that the Hugoton Gas Field comprises one interstate common source of supply of natural gas lying within the boundaries of the States of Texas, Oklahoma and Kansas. It is said to be the largest known reserve of natural gas in the world. The

largest portion of the field is located in Kansas. This portion of such field is commonly known as "Kansas-Hugoton." The portion in Oklahoma is called "Guymon-Hugoton," and that part in Texas, "Texas-Hugoton." *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 724, 222 P.2d 704; *Interstate Oil Compact Quarterly Bulletin*, Volume XI, December 1952, Nos. 3 and 4, page 12, and "*Conservation of Oil and Gas*, 1948," by Mineral Law Section of the American Bar Association, 165-183, 403-408. While the Hugoton Gas Field is a single interstate common source of supply of natural gas, the production in the portion of the field in Texas is regulated by the Railroad Commission of that state. Article 6008, *Vernon's Annotated Texas Civil Statutes*, 10 through 22; Articles 6008a-2, 6049c-7, and 6049d-4. Production in that portion of the field in Oklahoma is regulated by the Corporation Commission of Oklahoma under 52 O.S.A. 21 through 35, 231 through 233, and 236 through 247. Production in the portion of the field in Kansas, on the other hand, is regulated by the Corporation Commission of Kansas under G.S. 1949, 55-701 through 713, and G.S. 1959 Supp. 55-703, 706 and 711.

It thus is made apparent, as pointed out by this Court in *F.P.C.* v. *Transcontinental Gas Corp.*, *supra* (page 390 of L.Ed.2d), that one of such producing states in this common source of supply might wish to prolong its gas reserves for as long as possible while another might desire to deplete the field as rapidly as possible. The rule, as stated by this Court in *U. S.* v. *Louisiana*, 363 U.S. 1,

33, 4 L. Ed.2d 1025, 80 S. Ct. 961, that a land boundary between two states marks the place where the full sovereignty of one state ends and that of another begins, points up very clearly the impact on interstate marketing of gas from this single interstate common source of supply when one state attempts to conserve its gas and another decides to force speedy depletion of this exhaustible natural resource.[22]

If each gas producing state has the jurisdictional right, either exclusively or concurrently with the Federal Power Commission, to control such sales, there must necessarily result a lack of uniformity in the construction or modification of the controlling gas sales contracts, resulting in complete confusion and the stripping of all vitality from the jurisdiction of the Federal Power Commission over sales of gas in interstate commerce for resale.

The orderly administration of the Natural Gas Act requires that this Court take jurisdiction in these appeals and strike down this latest attempt by the State of Kansas

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[22] Analogous to this situation is the competition between Oklahoma and Kansas to fix prices for gas produced and sold in interstate commerce from the Hugoton Field. Oklahoma's price fixing efforts were stricken down by this Court in *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 43, 75 S. Ct. 576, 99 L. Ed. 866, while the Kansas effort to fix an even higher price was stricken down by this Court in *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391, 78 S. Ct. 381, 2 L. Ed. 2d 355.

to regulate sales of natural gas in interstate commerce for resale.

Respectfully submitted,

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December, 1961.

APPENDIX

APPENDIX A

No. 42,128

NORTHERN NATURAL GAS COMPANY,
Appellant,

v.

STATE CORPORATION COMMISSION,
Appellee.

SYLLABUS BY THE COURT

1. Gas—*Powers of Corporation Commission—Ratable Taking by Purchaser.*

The provisions of G.S. 1959 Supp., 55-703 are considered and held to be sufficient to give the Corporation Commission powers to pass rules to insure the fair and equitable taking of natural gas from a common source, and in such an attempt to provide for the ratable taking of natural gas by a purchaser.

2. Same—*Order of Commission—As to Ratable Taking by Purchaser—Validity.*

It is further decided that such an order as described in the first paragraph hereof did not impair the obligation of a contract possessed by the purchaser or impinge upon other constitutional rights of the purchaser.

3. Same—*Order of Commission—As to Ratable Taking by Purchaser—Federal Power Commission's Authority Not Impaired.*

It is also further decided that the order of the Commission as to the ratable taking of natural gas concerns only the production and gathering of gas and in no way impairs the control of the Federal Power Commission over the transportation of natural gas in interstate commerce under the federal Natural Gas Act, 15 U.S.C.A. §717 *et seq.*

Appeal from Finney district court; ROLAND H. TATE, judge. Opinion filed June 10, 1961. Affirmed.

Mark H. Adams II of Wichita argued the cause, and *Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, John S. Seeber* and *Floyd E. Jensen* of Wichita; *Lawrence I. Shaw, F. Vinson Roach*, and *Patrick J. McCarthy* of Omaha, Nebraska; *Ray H. Calihan, Logan N. Green, Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, of Garden City were with him on the briefs for the appellant.

Charles C. McCarter, general counsel, argued the cause, and *S. F. Fleeker*, assistant general counsel, was with him on the briefs for the appellee.

The opinion of the court was delivered by

JACKSON, J.: The appellant Northern Natural Gas Company began a judicial review action in the court below to review an order of the Corporation Commission directing it to take gas ratably from all gas wells in the Kansas Hugoton Gas Field to which its lines were connected including the gas wells owned by Republic Natural Gas Company with which company it had a special contract as to the purchase of gas. The district court affirmed the order of the Commission, and the appellant brings the matter to this court on an appeal from the district court's decision.

Throughout the remainder of this opinion we shall refer to the above parties as "Northern," "Republic," and the "Commission."

For many years Northern and Republic have been parties to a contract under which Northern agreed to take and pay for a sufficient amount of natural gas to supply 60% of the supply needed by Northern to satisfy the needs of its customers in a certain area in Iowa and Nebraska. The exact location of this area in Nebraska and Iowa is not important, but it is referred to in the briefs as the Omaha District. This contract covers only some 144 wells

owned by Republic and in the briefs this group of wells is referred to as the "Republic A" wells.

The above contract has been before this court in the former case of *Northern Natural Gas Co. v. Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708, in which opinion a more detailed account of the contract may be found.

There can be no question that Northern is engaged in the interstate transportation of natural gas by pipe line for sale in states other than Kansas, as defined in the Natural Gas Act. In the last case mentioned, the question at issue was the amount of gas which could be lawfully produced under the above contract and regulations of the Commission. The important part of the syllabus of the case just cited reads: "An operator of gas wells . . . as to the amount of gas he can produce from the wells . . . governed by the allowables for such wells made by the commission for the time in question and not by slightly less than three times such allowables."

Another case which is connected with this same contract between Republic and Northern is that of *Republic Natural Gas Co. v. State Corporation Commission*, 173 Kan. 172, 244 P.2d 1196. Those interested in an account of the manner of establishing proration allowables for gas wells in the Hugoton field are directed to the opinion in the last mentioned case. The case affirmed the Commission in making an order refusing to reinstate canceled "underages" of certain gas wells owned by Republic. The canceled underages had been canceled according to the rules of the Commission applying to the entire Hugoton field.

As early as 1938, Northern had begun to purchase additional gas supply in the Hugoton field in addition to the Republic "A" wells. In 1949, Northern entered into a gas purchase contract with Cities Service Oil Company. There-

after, Northern purchased other gas supply and now owns some 125 gas purchase contracts.

These gas purchase contracts cover a total of some 1,100 gas wells in the Hugoton field. Such contracts contain provisions for the ratable taking of gas between all gas wells with the exception that Republic "A" wells are specifically excepted from the provision for ratable taking and are given preference where the demand for gas does not equal the allowables for all of the wells. A copy of such contracts [*sic*] is contained in the abstract but need not be reproduced in this opinion.

Northern's position is quite clearly and forcefully stated in the following quotation taken from its brief:

> "As Northern has interpreted its commitments under its gas purchase contracts in such field, when Northern's market requirements from the field are less than the total allowables assigned to the wells connected to Northern, Northern's contractual commitment (as previously interpreted by the Court) under the Republic "A" contract is first deducted from Northern's gas requirements and allocated to the Republic "A" wells. The balance of Northern's requirements is then allocated ratably to all other wells to it connected in such Field."

Northern further tells us that from 1944 until 1958, Northern was largely able to take ratably from all wells connected with its lines, but it seems to concede that during 1958, it took gas from Republic "A" wells at a much greater rate than from the rest of the wells connected to its gathering lines. In January, 1959, the Cities Service wells connected to Northern's lines had a monthly allowable of 2,084,874 Mcf. They had an underage of 11,411,727 Mcf., and 123,711 Mcf. of these underages were canceled by the Commission under its general rules as being underproduced in excess of six times the January

current allowable. Northern's other connections aside from Republic "A" wells had a January current allowable of 9,309,441 Mcf. and a total underage of 48,604,070 Mcf.

The net status of these wells was 522.09 percent under produced, and they suffered cancellation of 409,393 Mcf. of the aforementioned underage.

In contrast, Republic "A" wells had a current January allowable of 2,674,390 Mcf. and an overage of 114,858 Mcf. They were overproduced 4.29 percent in that particular month.

Northern makes no claim that it would not have been possible to take gas ratably from all of its wells. It only claims that the contract with Republic gives it the right to prefer Republic "A" wells.

On May 27, 1959, the Commission on its own motion took notice of the above situation and issued an order to Northern to show cause why it should not take ratably from the wells to which it is connected in the Hugoton field in Kansas. The hearing was set first on June 26, 1959, but later continued to July 24, 1959 and the order appealed from was issued October 7, 1959.

At the hearing before the Commission, an expert witness testified as follows:

> ". . . I have expressed an opinion that there is drainage occurring. Our studies indicate that if the wells are produced with the same percent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected. There are two ways of accomplishing this currently in the Hugoton Field. One is to raise the total of Northern Natural's takes up until they are ratable with the Republic 'A' group, and second would be to lower Republic 'A' by curtailing their production, so they will become ratable with the balance of the field."

[APPENDIX]

We do not read the record to show that there is any contention but that drainage was occurring, and that the underproduced wells were losing the right to produce gas from the common source of supply to the great damage of the owners of the wells in the loss of their correlative rights.

While the members of this court make no claim to be experts in the science of the production of natural gas, we believe that the court may take judicial notice of the fact that where natural gas is within the earth in one common source and is under pressure, if one gas well is allowed to take gas, this will result in the pressure being lowered around the vicinity of this gas well so that the gas in the common source will tend to drain or rush to the vicinity of the well taking gas. The result will be that the other wells in the common field or source will be able to produce much less gas and the owners of such wells will have suffered a definite loss.

It should be noted at this time that shortly after the issuance of the order of the Commission dated October 7, 1959, directed only to Northern and which is appealed from in this present proceeding, the Commission, after due notice and hearing, issued a general rule applicable to all takers of natural gas from the Hugoton gas field and requiring that all takers of gas take ratably from the wells to which they are connected. Northern's appeal from that general order is to be found in *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. ____ P.2d ____.

In attempting to sustain its position in the present case, Northern first contends that our state Natural Gas Act does not provide for ratable taking; that the act applies only to producers of gas; that Northern is a purchaser of gas and a natural gas company engaged in interstate commerce. It refers to section 55-703, G.S. 1959 Supp., and

stresses the first part of the section which refers to producers. But Northern has ignored the latter part of the section wherein the following language is found:

> "The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent."

In Summers on *Oil and Gas*, Vol. 1A, sec. 103.1 p. 139, wherein the eminent author is dealing with ratable taking of oil and gas, that part of section 55-703 set out above is noted and the author concludes as follows:

> "The Kansas gas conservation act authorizes the state corporation commission to so regulate the taking of gas from any common source of supply as to prevent inequitable and unfair taking. This act does not expressly state that purchasers of gas in the common source of supply may be required to take ratably from all wells with which their pipe lines may be connected, *but unless the commission has such authority it cannot prevent inequitable and unfair taking.*" (Italics supplied)

It will be noted that the Commission is authorized to make rules and regulations for the purpose of accomplishing the results to which the Commission is directed; and that such rules and regulations have the force and effect

of law when filed in the office of the revisor of statutes (G.S. 1949, 77-410).

In search of Commission's Rule 82-2-101, which has been so filed, we find the following: "Taker: See purchaser." And in the same rule, purchaser is defined as follows:

> "Purchaser shall mean any person who directly or indirectly purchases, transports, takes, or otherwise removes production to his account from a well, lease or common source of supply. Purchaser is usually considered to be the person holding the division order." (Italics supplied) (*Sic*)

We believe Northern is mistaken in arguing that the above statute and the rules made thereunder do not apply to a purchaser of natural gas. We are only more convinced that the legislature had this in mind, by the fact that natural gas cannot be produced unless someone is ready to buy it, it cannot be stored in a tank on the lease. Therefore, as Professor Summers says, the object of the quoted provisions of section 55-703 cannot be accomplished unless the taker or purchaser can be controlled. We believe the statute is sufficient to reach Northern.

We note that in its brief, the Commission has directed attention to certain language in the opinion of *Republic Natural Gas Co. v. State Corporation Commission*, supra. While the whole opinion in that case is in line with what we are now deciding, the precise question now before us was not there involved.

The second objection to the validity of the order of the Commission appealed from is sweeping in its coverage and reads as follows:

"II

"Said order as approved by the trial court is arbitrary, unreasonable and discriminatory, has no relation to proration or conservation of gas, burdens interstate commerce and takes appellant's property and contract rights, all in violation of the commerce clause, the contract clause and the fourteenth amendment to the federal constitution, and the Kansas Bill of Rights, sections one, two and eighteen, and section seventeen, article two of the Kansas constitution."

Despite the sweeping indictment of the order, Northern really seems to simply argue that the contract has established the correlative rights of the parties, and that therefore, the state is powerless to prevent waste and drainage of gas as long as the monthly allowables are not unlawfully exceeded.

We would direct attention to a provision of the contract upon which Northern relies, and which reads:

"SECTION 2. *Commission Jurisdiction*. This contract is subject to all valid legislation with respect to the subject matter hereof, either State or Federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction."

We cannot agree with the argument that the monthly allowable is the whole story. Certainly, the wells attached to Northern and apart from Republic "A" are losing gas to Republic "A" and possibly to any other taker who is taking gas at a greater rate than Northern is allowing gas to be produced from these wells.

It would seem that ratable taking in the production of natural gas has been late in coming before this court for approval. The Supreme Court of Oklahoma upheld an order of the Corporation Commission of that state pro-

viding that a purchaser of natural gas must take gas from a producer having no contract with the purchaser and must also take ratably from the aforesaid producer; see *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Okla. 35, 220 P. 2d 279, affirmed on appeal, 340 U.S. 179, 95 L.Ed. 190, 71 S. Ct. 215.

It would appear to us that the opinions of the Supreme Court of Oklahoma and of the Supreme Court of the United States in the above case foreclose any of Northern's arguments in the case at bar. There was a matter of contract involved in the Peerless case. Cities Service undoubtedly thought they had a right to take gas from the wells from which it had contracted to buy gas, and that it had no duty to contract with Peerless. But it was held that the state might prevent drainage of gas from the Peerless wells despite the contracts held by Cities Service.

Certainly, in view of the above quoted provision of the contract between Northern and Republic, there has been no impairment of the obligation of contract in this case or any other impairment of constitutional right.

Lastly, Northern contends that the order of the Commission impinges upon the authority of the Federal Power Commission under the Natural Gas Act, 15 U.S.C.A. §717 *et seq.*

As above noted, we are quite well aware that Northern is engaged in the transportation and sale of natural gas in interstate commerce by pipe line. We do not believe, however, that the matters dealt with in this case affect interstate transportation or sale in any respect. That is, the matters dealt with in this case pertain to "production and gathering of natural gas." (15 U.S.C.A. §717(b)).

It should again be emphasized that the Commission's order did not direct Northern as to the amount of gas which it should take, it only directed that the amount

Northern needs shall be taken ratably from all the gas wells which Northern serves. Northern agrees that it could do this, but says it would have to give up its contracted preference to Republic "A" wells. Everyone would be happy if Northern would take the entire monthly allowable from all of the wells served. Northern says that in the near future it believes that it will be able to do this very thing.

We believe that the state may regulate the production of natural gas and the gathering of the same to the extent necessary to insure that the gas under one owner's land will not be drawn off by his neighbor, and that his neighbor cannot plead a contract with a third person to give him a right to drain gas from his neighbor.

All of the matters contained in Northern's brief have been fully considered, and we find that the order appealed from must be affirmed. It is hereby so ordered.

SCHROEDER, J., dissenting: The Commission by its order directed to Northern assures it has authority under G. S. 1949, 55-703, as amended, to control and regulate *purchases* of gas by Northern engaged in the interstate transportation of gas. This [illegible] beyond the authority of the statute.

What the Commission [illegible] and in the companion case [illegible] is to set up one proration system, having as between purchasers, within a proration system controlling production under the Basic Order for the Hugoton Gas Field adopted on the 21st day of March, 1941, *which was designed and declared by the Commission to accomplish the purposes for which article 7, chapter 55, General Statutes of Kansas for 1935 was enacted.*" Basic Proration Order for the Hugoton Gas Field, paragraph m. (Emphasis added.)

By the Commission's order dated October 7, 1959, Northern was directed to take gas ratably from its con-

nections in the Kansas Hugoton Gas Field (Case No. 42,128), and by the Commission's order promulgating Rule 8-2-219 (Case No. 42,127), all companies *purchasing gas* from a common source of supply under proration by the Commission are required to take gas in proportion to the allowables from all the wells to which each is connected.

The Basic Proration Order for the Hugoton Gas Field, as amended, and in effect at times material, by a system of proration, controls the *production* of gas in the Hugoton Field. The end sought in fixing *production quotas* was to enable each developed lease to currently produce its daily allowable so that ultimately such developed lease would have an opportunity to produce approximately the amount of gas which underlies such lease. It recognized the available production of the wells in the Hugoton Field was far in excess of the market demand, and found:

> "f. That since there exists disproportionate *production* from the wells and leases in said field which impairs the correlative rights of many of the owners of developed leases, it is necessary for the Commission to take jurisdiction and to prescribe *regulations for the production of gas* from said wells and others that may be hereafter completed in said field to the end that each person, firm, or corporation *having the right to drill into and produce natural gas from said field may take therefrom only such proportion of the amount that may be produced therefrom without waste* as will permit each well or developed lease *to produce* ultimately at least approximately the amount of gas underlying the land or lease on which such well is located and *currently produce proportionately* with the other wells in said field . . ." (Emphasis added.)

The basic order adopted a formula which was said to have a reasonable relation to the prevention of waste.

to the prevention of inequitable and unfair *production of gas from the common source of supply*, and to the prevention of unreasonable discrimination in favor of one *producer* in said field and against another *producer* therein (paragraph m). The order directed that there be held two market demand hearings for each year (paragraph n) to determine the market demand for natural gas from the Hugoton Field for the next succeeding proration periods, and directed the preparation and promulgation of a new schedule of *production* allowable for the wells in said field, *based upon the determination made as a result of the market demand hearing* (paragraph o).

The record presented discloses that pursuant to paragraph "n" of such basic proration order, two market demand hearings for each year were and are held by the Commission, and market demand orders were and are issued for six-month periods (October 1 to March 31 and April 1 to September 30), in addition to which monthly *proration or allowable orders were and are issued for each month spreading and allocating the market demand and fixing the monthly allowables assigned to each of the producing gas wells in said field.*

The record discloses that for the entire period from April, 1944, through February, 1958, there were no important differences between the ratable purchases by Northern from Republic "A" wells and other wells to which it was connected. The difference in ratio was less than one times the January allowable for essentially the entire period.

However, in the spring of 1958, a wide difference in Northern's purchases appears between the Republic "A" wells and the others.

The reason stated to the Commission and assigned by Northern for this difference is:

". . . First, as the Commission is well aware, *allowables granted by the Commission to the field have*

exceeded the total field production by approximately 130 billion cubic feet and the wells connected to Northern, other than the Republic 'A' wells, have become substantially underproduced. Second, is the fact that Northern has been seriously delayed in expanding its system into new markets for gas by reason of the failure of the Federal Power Commission to issue the necessary Certificates of Public Convenience and Necessity . . ." (Emphasis added.)

Testimony on behalf of Northern was that given sufficient time it would be able to conduct its operations in such a way that the taking from the wells to which it was connected would be ratable. This was based *on the assumption that the Commission's future allowable assignments will be realistic*, and on the further assumption that the necessary expansion certificates will be issued to Northern by the Federal Power Commission.

It must be recognized that Northern's Republic "A" contract is subject to all valid legislation with respect to gas purchases in the Hugoton Field, either state or federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction. (See, *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 478, 241 P.2d 708.)

The testimony on behalf of Northern was that as far as facilities were concerned, it was not physically impossible for Northern to take gas ratably from the Republic "A" wells and all other wells connected to its system. The evidence further disclosed that if the markets were sufficient so that Northern could take the current allowables from the Republic "A" wells and also take the current allowables from all other wells connected to it, then Northern's take would be ratable as between all wells connected to its system. In other words, *when the market conditions are at the same level as the allowables then the same re-*

turn of take would exist between the Republic "A" wells and all other wells to which Northern was connected.

Theoretically, when these facts are considered in the light of the Basic Proration Order for the Hugoton Field and the statute pursuant to which it was promulgated, if the Commission is not derelict in its duty *to correlate allowable production with the market demand*, all wells of necessity would be *produced* ratably without supplementation by any order or rule to control the *purchasers* of gas in the Hugoton Field. Taking into consideration the entire history of Northern's purchases of gas in the Hugoton Field starting from April, 1944, the above theory seems to have practical application.

It is readily apparent that any effort to control the purchase of gas, which of necessity on the facts before the court in the instant case is limited to those wells connected to Northern's gathering system and pipe line, cannot protect the correlative rights of all producers from the common source of supply in accordance with the mandate of the statute. It fails to take into consideration those wells, potentially capable of production, which have no market for their gas, and the differential in markets among the various purchasers of gas from the common source of supply. Therefore, if the Commission fails to exercise its power *to correlate production with demand*, it cannot accomplish the mandate of the statute, and resort to a method which requires *the purchasers* of gas in the Hugoton Field to take ratably from the wells to which each is connected is little more than a futile gesture.

It must be assumed the legislature was aware of the situation regarding the production and development of gas in this state when 55-703, *supra*, was first enacted in 1935, and when subsequent amendments were made thereto, but it did not expressly authorize the Commission to require purchasers of gas in the common source of supply to take ratably from all wells to which their pipe line

was connected. It undoubtedly felt the control of production was sufficient to accomplish the purposes for which the statute was enacted.

An analysis of G. S. 1949, 55-703, as amended, (now G. S. 1959 Supp., 55-703) will disclose the Commission has no jurisdiction over purchases of gas by an interstate pipe line company. Our gas conservation law is Chapter 55, Article 7, and is entitled "PRODUCTION AND CONSERVATION OF NATURAL GAS." The applicable section of this statute is 55-703, *supra*. In pertinent part it reads:

> "[1] Whenever the available *production* of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, *then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced* without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. [2] The commission shall so *regulate the taking of natural gas from any and all such common sources of supply* within this state as to prevent the *inequitable or unfair taking from such common source of supply* by any person, firm or cor-

poration and to prevent unreasonable discrimination in favor of any one common source of supply as against another and *in favor of or against any producer* in any such common source of supply . . ." (Emphasis and numbers added.)

In both cases the Commission relies upon the above quoted portion of the statute marked [2], categorically stating this is the source of its jurisdiction.

An examination of this portion of the statute, and those portions thereof which have been italicized, makes it clear that *the taking referred to*, over which the Commission is to have regulatory jurisdiction under certain circumstances, *is from the common source of supply*. As applied to the Kansas Hugoton Gas Field the common source of supply would be the so called "Hugoton P. ... Zone," or the producing horizon described as gas encountered at an average depth of from 2700 to 2800 feet below the surface within the Kansas Hugoton Gas Field. Therefore, the taking referred to is not a taking from the wellhead, or from a producer, or from the end of a gathering system owned by the producer some miles from the wellhead, but the taking referred to is from the common source of supply.

It must be noted the phrase "person, firm or corporation" used in both the first and second portions of the quoted statute, is defined in the first portion as one "*having the right to produce natural gas.*" (Emphasis added.) It is difficult to believe the legislature intended that on the one hand such expression referred to a producer, and on the other hand to a purchaser.

The court in *White Eagle Oil Co. v. State Corporation Comm.*, 168 Kan. 548, 214 P.2d 337, quotes a portion of the first sentence of the section of the statute in question which it construes as being the statutory mandate or declaration of public policy with regard to *production*.

While the Commission's general rules and regulations, in Rule 92-2-101, under the definition of "taker" refers the reader to the definition of "purchaser," the rules do not give the Commission jurisdiction to regulate purchases, unless such authority is found in the statute. In other words, if the statute does not confer power upon the Commission to regulate the purchases of gas, it cannot confer such power upon itself by the adoption of a rule.

The State Corporation Commission of Kansas has a limited jurisdiction. It posseses no powers not given it by statute. (*Bennett* v. *Corporation Commission*, 157 Kan. 589, 596, 142 P.2d 810; *Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 80 L.Ed. 528, 56 S.Ct. 397; 24 Am. Jur., Gas and Oil, §144, p. 628; and see, *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U.S. 627, 77 L.Ed. 1410, 53 S.Ct. 768.)

On those several occasions over the life of the statute when this court has been called upon to construe 55-703, *supra*, and its companion sections, it has consistently construed such act as a statute giving authority to regulate production, and not purchases. (*Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, supra; and *Republic Natural Gas Co.* v. *State Corporation Commission*, 173 Kan. 172, 244 P.2d 1196.)

In *Republic Natural Gas Co.* v. *State Corporation Commission*, supra, the court in substance said that the continuing duty on the part of the Commission was to cause the *production* of gas from any well to be ratable, in accordance with the provisions of the statute and the basic order; and that no operator or producer had any vested right to produce from any well more gas in any month than was assigned it as its allowable, the entire matter of *producing gas* from a well being subject to the provisions of the basic order and the statute. In other words, under 55-703, *supra*, to "take" gas means to "produce" gas. The

essence of the gas conservation statute is that it operates on the operator or producer of the well.

In construing our oil conservation statute, which is very similar to our gas conservation statute, this court in *State, ex rel.*, v. *Sinclair Pipe Line Co.*, 180 Kan. 425, 304 P.2d 930, stated:

> "The statutes with reference to waste are G. S. 1949, 55-601 to 55-608, inclusive. The production of crude oil in such a manner as to constitute waste is prohibited by G. S. 1949, 55-601, and made a crime by G. S. 1949, 55-607. *The statute refers only to production.* Sinclair, as we have demonstrated, is engaged strictly in interstate transportation of crude oil. The Oklahoma statute on waste is almost identical to ours. In speaking of that statute, the supreme court of the United States held in *Champlin Rfg. Co.* v. *Corporation Commission*, 286 U.S. 210, 76 L.ed. 1062, 52 S.Ct. 559:
>
> "'It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products'." (pp. 437, 438.) (Emphasis added.)

It is significant to note that the oil statute, G. S. 1949, 55-603, states in part: ". . . *any person having the right to drill into and produce* oil therefrom may *take* therefrom . . ." (Emphasis added.) (See, Two Cases on Conservation, Vol. 6, J.B.K. p. 149, by H. H. Lesar.)

It is apparent that heretofore the Commission itself has always construed the statute in question as one authorizing the regulation of production, and not purchases. In paragraph "f" of the Basic Proration Order for the Hugoton Gas Field the Commission found "The present and past *production* from the wells in said field is and has been *inequitable* and *unfair*." (Emphasis added.) At another place in paragraph "f" the Commission found "it is neces-

sary for the Commission to take jurisdiction and to prescribe regulations for the *production* of gas." (Emphasis added.)

In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 203 Okla. 35, 220 P.2d 279, the Oklahoma Supreme Court directed Cities Service, a purchaser of gas, to take gas ratably from other wells in a given field. From this decision the Commission argues that ratable take statutes do in fact apply to purchasers as well as producers.

It must be noted in the state of Oklahoma the legislature has enacted a *common purchasers' statute*, requiring that purchasers of gas shall purchase and transport natural gas from each person or producer ratably, in proportion to the average production, and prohibits such common purchasers from discriminating in price or amount for like grades of natural gas or facilities as between producers or persons. (52 Okl. St. Ann., §23.) Also, the legislature of Oklahoma in its conservation of oil and gas *statute* has defined the term "taker" to include a purchaser of natural gas as follows:

> "(i) The term 'Taker' shall include any person, who, acting alone, or jointly with any person or persons, is directly or indirectly purchasing or transporting by any means whatsoever or otherwise removing oil or gas from any common source of supply in this State. Laws 1947, p. 326, §1." (52 Okl. St. Ann., §86.1.)

It is clear the Kansas Corporation Commission cannot look to the statutes of other states, or to the judicial construction of such statutes, for power to control purchasers of gas in Kansas under the provisions of G. S. 1949, 55-703, as amended.

Both the statute and the Basic Proration Order for the Hugoton Gas Field purport to give the Commission jurisdiction over the regulation of production only. In other words, the "taking" which must be ratable under

the statute and the basic order is the *production* of gas from the common source of supply, not the *purchasing* of gas. By a mandatory direction from the legislature the Commission has jurisdiction over production, so that such production will neither be inequitable nor unfair. The "Order" (Case No. 42,128) and the "Rule" promulgated by the Commission (Case No. 42,127) here under review which is directed to purchasers, rather than operators or producers, and seeking to regulate the purchase of gas, or the manner of making such purchases after production has ceased, rather than to regulate the production itself, are in my opinion invalid because they go beyond the jurisdiction conferred upon the Commission by the statute.

APPENDIX B

No. 42,128

NORTHERN NATURAL GAS COMPANY
Appellant
v.
STATE CORPORATION COMMISSION
Appellee

OPINION DENYING MOTION FOR REHEARING

Appeal from Finney district court; ROLAND H. TATE, judge.

Opinion filed August 31, 1961. (For original opinion of affirmance see *ante* p. 355, 362 P.2d 599.)

The opinion of the court was delivered by

JACKSON, J.: In its motion for rehearing Northern disclaims the position of contending that our gas statute G.S. 1959 Supp. 55-703 does not require ratable production

of gas from a common source. It says the question is whether the statute also requires ratable purchases of gas. It then warns the court not to invade the jurisdiction of the Federal Power Commission by dealing with purchasers, citing *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L.Ed. 1035; *Natural Gas Co.* v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576; *Deep South Oil Co. of Texas* v. *Federal Power Com'n.*, 247 F.2d 882; *Saturn Oil & Gas Company* v. *Federal Power Com'n.*, 250 F.2d 61, cert. denied 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542; *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P. 2d 528, reversed 355 U.S. 391, 2 L. Ed 2d 355, 78 S. Ct. 381; and *Cities Service Gas Co.* v. *State Corporation Commission*, 184 Kan. 540, 337 P.2d 640.

We had read those cases before the opinion in this case was announced, and we believe those cases all dealt with the question of the power to regulate the price of gas. As we tried to point out in the opinion as filed, this case in no way involves the price of gas. Northern studiously avoids that fact. Moreover, the ratable taking order does not regulate the total amount of gas which Northern may take. We fail to see how the order affects interstate commerce in any way.

Northern magnanimously states that the state may control the ratable production of natural gas, but fails to inform us how this can be done unless the producer can find a "taker" for his gas.

It is not important in this case that the purchaser has a contract to purchase the gas at a price, which we will assume is subject to the regulation and jurisdiction of the Federal Power Commission, but the only important matter is that the "taker" take gas so that it may be produced. This case involves nothing to our knowledge which has anything to do with the price paid by the purchaser for gas, nor how much gas he buys. The only matter here involved is whether the taker must take ratably from all

wells to which he is connected and thus preserve the rights of the land owners.[1] We again refer to the statement of Professor Summers of the University of Illinois School of Law set out in the original opinion to show that ratable production can not be accomplished unless the taker will take gas ratably.

Northern has in this case cast some reflection upon the increase of allowables in 1958 by the Kansas Commission. The record contains no facts concerning this action of the Commission. But we must assume that the Commission believed that the market was sufficient to warrant the increase. Moreover, if we are justified in taking judicial notice of facts, we must also assume that the Kansas allowables were not greater than the Oklahoma allowables. And we notice that it was generally thought to be a fact that drainage of gas was occurring from the Kansas Hugoton field to that part of the field in Oklahoma.

Thus, in 1958, the Commission may have been, in a roundabout way, endeavoring to set up ratable taking as between Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells.

Of course, none of this is involved in the record of the case before us. However, we may direct attention to the news story on page 54, in *Newsweek* for July 10, 1961, entitled *Natural Gas: Two Straws*. It is there noted that the Hugoton field covers some 4.1 million acres in Kansas, Oklahoma and Texas; that most of the estimated 300 trillion cubic feet of gas in the field lies under Kansas soil, but that Oklahoma supplies the major share of the 2 million cubic feet pumped daily northward through the pipe lines.

The motion for rehearing is denied.

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[1] Reference might again be made to that part of G.S. 1959 Supp. 55-703 which is quoted in the original opinion, and to the discussion in the late case of *Renner* v. *Monsanto Chemical Co.*, 187 Kan. 158, p. 170, 354 P.2d 326, relating to the proration and ratable taking as to oil.

Schroeder, J., is of the opinion the judgment of the trial court should be reversed, and therefore dissents.

APPENDIX B(a)

NEWSWEEK Magazine

July 10, 1961

Natural Gas:

TWO STRAWS

The biggest border feud since Missouri slaveholders tried to take Kansas away from the abolitionists a century ago was shaping up last week over a vast, $30 billion pocket of natural gas that lies under 4.1 million acres of prairie land in Southwest Kansas, the Oklahoma panhandle, and northern Texas. Most of the estimated 300 trillion cubic feet of gas in the Hugoton field, as it is known, lies under Kansas. But Oklahoma supplies the major share of the daily 2 million cubic feet that is pumped northward through pipelines—and Kansans don't like that at all.

"It's as though there were two straws in the same chocolate soda," a Kansas official explained last week. "If the soda is sucked up faster through one straw, the man on the end of that straw is going to get more than his share."

In an effort to put a crimp in the Oklahoma straw, the Kansas Supreme Court last month ruled that the Northern Natural Gas Co., whose pipelines carry gas from all sections of the Hugoton field, must pump equally from all their wells. Not only would the ruling mean another $5 million to $10 million annually for well owners in the Sunflower State, but it would stop what Kansans claim is

a steady seepage of their reserves into the Oklahoma portion of the field.

UNFAIR: Alf Landon, the normally calm-speaking ex-governor who was the Republican Presidential candidate in 1936, showed just how riled up Kansans are about what they consider a misuse of the state's natural resources. "To me, corporations which persist in wasting natural gas . . . and persist in violating the rights of Kansas landowners and producers, all to the detriment of the best interests of Kansas, have no real sense of responsibility," he said.

Northern Natural Gas Co., arguing that its pumping pattern had been approved by the Federal Power Commission, last week asked the Kansas court to reverse its decision.

Whatever the outcome, it seemed certain that the border feud was headed for the U. S. Supreme Court. As chairman Harold Freeman of the Oklahoma Corporation Commission put it: "The Kansas Supreme Court doesn't have jurisdiction in this situation. More than 90 per cent of the gas leaving the Oklahoma portion of the Hugoton field goes into interstate commerce."

APPENDIX C

(Omitting Formal Parts)

JOURNAL ENTRY

Now on this 8th day of April, 1960, there comes on for consideration and determination by the Court, the petition of Northern Natural Gas Company for Judicial Review of the October 7, 1959, Order of the State Corporation Commission directing the petitioner to take gas

ratably from the Kansas Hugoton Gas Field. The petitioner appears by its attorneys of record, and the respondent, State Corporation Commission, appears by its attorneys of record.

Whereupon, the Court, having examined the files and records herein, and having heard the argument of counsel on March 15, 1960, finds that the said order of the State Corporation Commission, dated October 7, 1959, directing petitioner to take gas ratably from the Kansas Hugoton Gas Field is lawful, valid, and reasonable, and should be affirmed.

It Is, Therefore, by the Court Considered, Adjudged and Ordered: That the October 7, 1959, Order of the State Corporation Commission directing Northern Natural Gas Company to take gas ratably from the Kansas Hugoton Gas Field is affirmed.

By the Court,
/s/ Roland H. Tate,
Judge

APPENDIX D

(Omitting Formal Parts)

ORDER.

Now on this 7th day of October, 1959, the above-entitled matter comes before the Commission for further consideration and final disposition. The Commission (Harry G Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners), having examined the record, exhibits, files and briefs of counsel, and being fully advised in the premises, finds:

1. That Northern Natural Gas Company is not taking ratably from its connections in the Kansas Hugoton Gas Field which is a common source of supply.

2. That Northern Natural Gas Company purchases part of its gas from Republic Natural Gas Company under a contract which shall be designated as the "Republic A" contract. That this "Republic A" contract requires Northern Natural Gas Company to take certain quantities of gas or pay for it even if not taken. That this "Republic A" contract has a further provision making it subject to all valid legislation and all valid orders, rules, and regulations of duly constituted authorities having jurisdiction.

3. That the wells dedicated by Republic Natural Gas Company to the fulfillment of this "Republic A" contract have been produced at a much greater rate (percentage of allowables) than other wells connected to the Northern Natural Gas Company system. That the disparity in rates of production has been so great that many wells have accumulated sizeable underages while the wells producing under the "Republic A" contract are producing the current allowable and some are overproduced. That this is not ratable taking from a common source of supply.

4. That under the Gas Conservation Laws of the State of Kansas, G.S. 1949, 55-703, the Commission is given the duty and power to "so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *" This is also reflected in the Basic Order for the Hugoton Field.

5. That the right to enter into private contracts can not be used as a means to circumvent lawful orders of the Commission or valid laws passed by the Legislature. Therefore the fact that Northern Natural Gas Company may be contractually bound to take a certain quantity of gas from

certain wells is not binding on the Commission in its duty to regulate the production of gas from the entire field.

6. That Northern Natural Gas Company should be ordered to take gas ratably from its connections in the Kansas Hugoton Gas Field.

It Is, Therefore, by the Commission Ordered: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

By the Commission It Is So Ordered.

Raymond B. Harvey
Secretary

(Seal)

APPENDIX E

NO. 42,127

NORTHERN NATURAL GAS COMPANY,
Appellant,
v.
STATE CORPORATION COMMISSION,
Appellee.

SYLLABUS BY THE COURT

Gas—*Order of Corporation Commission—Requiring Ratable Taking by All Purchasing Companies.*

Pursuant to the provisions of G. S. 1949, 55-703, as amended, the State Corporation Commission has power to issue an order promulgating a rule to regulate the

production of natural gas in such a manner as to require all gas purchasing companies to take natural gas ratably from all wells within the same common source of supply to which each is connected.

Appeal from Finney district court: ROLAND H. TATE, judge. Opinion filed June 10, 1961. Affirmed.

Mark H. Adams, II, of Wichita, argued the cause, and *Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, John S. Seeber* and *Floyd E. Jensen*, all of Wichita, and *Lawrence I. Shaw, F. Vinson Roach* and *Patrick J. McCarthy*, all of Omaha, Nebraska, and *Ray H. Calihan, Logan N. Green, Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, all of Garden City, were with him on the briefs for the appellant.

Charles C. McCarter, General Counsel, argued the cause, and *S. F. Fleeker*, Assistant General Counsel, was with him on the briefs for the appellee.

The opinion of the court was delivered by

SCHROEDER, J.: This is a judicial review action to determine the validity of a State Corporation Commission order and rule directed to gas purchasers, rather than gas producers, requiring them to purchase ratably from all wells within the common source of supply to which each purchaser is connected.

The petition for judicial review was filed on February 19, 1960, by Northern Natural Gas Company (hereinafter referred to as Northern or appellant) in the district court of Finney County, Kansas. Thereafter on the 8th day of April, 1960, the district court having heard argument of counsel entered its judgment confirming the Commission's order of February 3, 1960, and the Commission's promulgation of Rule 82-2-219 thereby. The lower court found the rule and order of the State Corporation Commission to be lawful, valid and reasonable.

After the trial court overruled Northern's motion for a new trial, appeal was duly perfected to this court.

In a companion case, *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan , P.2d , No. 42,128, decided this date, Northern was directed by the State Corporation Commission to show cause why it should not take ratably from the wells to which it was connected in the Hugoton Field in Kansas. As a result of proceedings therein Northern was directed by an order of the Commission "to take gas ratably from its connections in the Kansas Hugoton Gas Field." As a part of such order the Commission retained jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders and promulgating and implementing such further rules and regulations as from time to time it deemed proper.

In Northern's petition for rehearing before the Commission, filed November 6, 1959, Northern contended, among other things, the order directed against it was unlawful in that:

> "(d) It purports to amend said Commission's Basic Proration Order for the Hugoton Gas Field insofar only as it affects one (Northern Natural Gas Company) of the seven principal purchasers of gas therein and in a proceeding not noticed to any party as being a proceeding for the amendment of said Basic Proration Order all in violation of the due process clause of the Constitution of the United States."

Northern's petition for rehearing in the "show cause" case was denied and judicial review proceedings concerning the Commission's order dated October 7, 1959, were filed in the district court of Finney County, Kansas, now on appeal in the Supreme Court as Case No. 42,128, heretofore noted as the companion case.

The Commission, in apparent recognition of Northern's objection heretofore quoted, sought to bolster its position in the case against Northern, which arose from circumstances applying only to that company, and on November 12, 1959, on its own motion ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. In issuing such order the Commission found:

"1. That G. S. 1949, 55-703, as amended, imposes the following duty on this Commission:

> "'The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation . . .'

"2. Evidence presented to the Commission indicates that some companies have been and are producing certain wells at higher rates than other wells in the same common source of supply; that this disparity in rates of production has resulted in the accumulation of sizable underages by many wells while others are producing their current allowables; that such situation, if permitted to continue, would violate correlative rights, and the statutory provision above set forth.

"3. That in effectuating its statutory duty in the premises, an investigation should be instituted and a public hearing held thereon for the purpose of considering the adoption of a Rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected."

Pursuant to such findings the Commission ordered:

". . . That an investigation be and it is hereby instituted herein for the purpose of considering the adoption of a Rule to require companies to take gas ratably from all wells to which they are connected in the same common source of supply."

Notice was duly published on December 5, 1959, in the Topeka Daily Capital and a copy of such notice was mailed to all interested parties. Pursuant thereto a hearing was conducted in which the interested parties entered an appearance to present evidence and arguments on the matter.

The Commission, recognizing that it was prompted to conduct the instant proceedings by its docket in the matter of Northern to show cause (Docket No. 60,740-C), in which considerable evidence was taken, ordered the testimony and exhibits in Docket No. 60,740-C incorporated and made a part of the record. Therefore, the facts upon which the rule was promulgated in the instant case are in all material respects identical and present the same issues as the companion "show cause" case.

As a result of the hearing the Commission found pursuant to its duty under G. S. 1949, 55-703, as amended, that it was necessary to promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which each is connected, and by its order dated February 3, 1960, adopted Rule 82-2-219, which reads:

"Ratable Production of Gas from Common Source of Supply.

"In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such

wells in substantially the same proportionate status as to overproduction or underproduction: provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser." (Authorized by G.S. 1959, Supp. 55-703; Effective February 8, 1960)."

In promulgating such rule the Commission found it met the mandate of the statute and enabled the Commission "to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected."

The Commission's general rules and regulations for the conservation of crude oil and natural gas were amended by adding Rule 82-2-219, and the Commission directed that its order and rule be filed with the Revisor of Statutes on February 8, 1960, at which date it was to be published and become official.

The contentions of the appellant are presented in its brief by what it denominates "Questions Involved." They are as follows:

"I.

"Said order and the rule promulgated thereby, approved by the trial court, and each of the findings of fact therein purporting to be in support thereof are not supported by substantial, competent, relevant evidence, and are unauthorized by and contrary to the Kansas Statutes dealing with the production and conservation of natural gas, the basic proration order for the Kansas Hugoton Gas Field and Commission's state-wide gas conservation rules and regulations.

"II.

"Said order and the rule promulgated thereby as approved by the trial court are arbitrary, unreasonable and discriminatory, have no relation to proration or conservation of gas, burden interstate commerce and take appellant's property and contract rights all in violation of the Commerce Clause, the Contract Clause and the Fourteenth Amendment to the Federal Constitution, and the Kansas Bill of Rights, Sections One, Two and Eighteen, and Section Seventeen, Article Two of the Kansas Constitution.

"III.

"Said order and the rule promulgated thereby as approved by the Court under the evidence as applied to appellant violates the provisions of the Natural Gas Act (15 USCA, 717 et seq) and invades the jurisdiction of the Federal Power Commission thereunder."

The foregoing contentions are identical with those advanced by Northern in the companion "show cause" case, No. 42,128, where they have been considered and answered by the court, upholding the power of the Kansas Corporation Commission to regulate the production of natural gas in such a manner as to require Northern to take gas ratably from all gas wells in the Kansas Hugoton Gas Field to which its lines were connected.

It follows that if the Commission has authority pursuant to G. S. 1949, 55-703, as amended, (now G. S. 1959 Supp., 55-703) to lawfully issue such order with respect to one company, *a fortiori*, the Commission may lawfully promulgate and adopt a rule requiring all gas purchasing companies to take natural gas ratably from all wells within the same common source of supply to which each is connected.

We therefore hold Rule No. 82-2-219 and the order promulgating it are valid and lawfully adopted pursuant

to the power conferred upon the State Corporation Commission by the provisions of G. S. 1949, 55-703, as amended.

The judgment of the lower court is affirmed.

Schroeder, J., dissents.

APPENDIX F
(Omitting Formal Parts)

JOURNAL ENTRY.

Now on this 8th day of April, 1960, there comes on for consideration and determination by the Court the petition of Northern Natural Gas Company for judicial review of the State Corporation Commission's Rule 82-2-219, entitled "Ratable Production of Gas From a Common Source of Supply," promulgated on February 8th, 1960, and the February 8th, 1960 Order of said State Corporation Commission promulgating said rule. The petitioner appears by its attorneys of record, and the respondent, State Corporation Commission, appears by its attorneys of record.

Whereupon, the Court having examined the files and records herein, and having heard the arguments of counsel on March 15, 1960, finds that the said rule and order of the State Corporation Commission are lawful, valid and reasonable, and should be affirmed.

It Is, Therefore, by the Court Considered, Adjudged and Ordered: That the State Corporation Commission's Rule 82-2-219, entitled "Ratable Production of Gas from a Common Source of Supply," promulgated on February 8, 1960, and the February 8, 1960 Order of said State Corporation Commission promulgating said rule are affirmed.

By the Court,
/s/ Roland H. Tate,
Judge.

APPENDIX G

(Omitting Formal Parts)

ORDER.

Now on this 3rd day of February, 1960, the above-entitled matter comes on for consideration and determination by the State Corporation Commission, hereinafter referred to as the Commission. The Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) having heard the evidence and examined the files and records, and thereby being fully advised in the premises, finds:

1. That on November 12, 1959, the Commission, upon its own motion, ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. That notice of the time and place of said investigation and hearing was published on December 5, 1959, in the Topeka Daily Capital, and that a copy of such notice was mailed to all interested parties. Pursuant to notice, a public hearing was held on December 17, 1959, at the Lassen Hotel, Wichita, Kansas. Appearances were as follows:

Lewis M. Poe and Stuart Carter, representing Colorado Interstate Gas Company;

Stuart R. Carter, representing Sinclair Oil and Gas Company;

Alfred O. Holl and P. K. Smith, representing Cities Service Oil Company;

Ralph R. Brock, representing Northern Pump Company; and W. L. Hartman;

Richard Jones, representing Republic Natural Gas Company;

Milo M. Unruh, representing Kansas-Colorado Utilities, Inc.;

Norton Standaven and Charles Lindberg, representing Pan-American Petroleum Corporation;

O. R. Stites, representing Cities Service Gas Company;

Jeff A. Robertson and C. C. Linley, representing Panhandle Eastern Pipe Line Company;

A. E. Kramer and Dale Stucky, representing Southwest Kansas Royalty Owners Association;

George W. Selinger, representing Skelly Oil Company;

Mark H. Adams, Mark H. Adams, II, and Jack C. Osborne, representing Northern Natural Gas Company;

W. P. Wesley, representing Western Natural Gas Company;

J. L. Higday, representing Kansas Power and Light Company;

J. Robert Wilson and John Townsend, representing the Commission

The hearing was adjourned for the purpose of receiving and disseminating proposals, until January 21, 1960, at which time the hearing reconvened. Appearances in addition to those entered at the hearing of December 17, 1959, were as follows:

Stanford Smith, representing Cities Service Oil Company;

Homer Penn, representing Republic Natural Gas Company;

Richard Jones, representing Superior Oil Company, a California corporation;

Milo M. Unruh, representing Plateau Natural Gas Company;

Richard Jones and William R. Loar, representing Sunray Mid-Continent Oil Company;

Ferd Evans, representing J. M. Huber Corporation;

Donald Mitchell, representing Atlantic Refining Company;

Daniel R. Hopkins, representing Hugoton Production Company;

W. P. Wesley, representing Columbian Fuel Corporation; and

Charles Lindberg, representing Mobil Oil Company, a division of Socony-Mobil Oil Company, Inc.

2. That G.S. 1949, 55,703, as amended, imposes the following duty on this Commission:

> "The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *"

3. That for the purpose of facilitating such regulation, and thereby accomplishing the duty contemplated by the statute, it is necessary that the Commission promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which they are connected.

4. That the Commission's staff and other parties have submitted proposals at the hearings, and subsequent thereto, which have been considered by the Commission.

5. That Exhibit "A", designated as Rule 82-2-219, meets the mandate of the statute and will enable the

Commission to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected; and that the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas should be amended by adopting the proposed Rule as contained in Exhibit "A", and that said proposal should be designated Rule 82-2-219.

6. That Rule 82-2-219 is of statewide application and should therefore be filed with the Revisor of Statutes on February 8, 1960. This order and Rule 82-2-219, which is attached hereto as Exhibit "A" and made a part hereof, should be served upon all parties affected by this rule by first class United States mail. Further notice should be given by publishing this order including Rule 82-2-219 in the official state paper; on February 8, 1960, and this rule shall become effective on February 8, 1960.

It Is, Therefore, by the Commission Ordered: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960.

And It Is Further Ordered: That this order and said rule, duly certified, be served upon all parties to be affected by first class United States mail and that further notice be given by publishing this order including Rule 82-2-219 in the Official State Paper, on February 8, 1960.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders, and promulgating and implement-

ing such further rules and regulations as from time to time it may deem proper.

By the Commission It Is So Ordered.

Wiles, Chm.; Beatty, Com.; Byrd, Com.

EXHIBIT "A".

Rule 82-2-219

RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY.

In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959, Supp. 55-703; Effective February 8, 1960).

APPENDIX H

55-707. Actions for judicial review; appeals. That actions for judicial review of any rule, regulation, order or decision of the commission under the provisions of this act may be brought and proceedings respecting same shall be governed by and appeals may be taken as provided in section 55-606 of the General Statutes of Kansas of 1935, as amended and that each and all of the provisions of

said section, as so amended, shall apply to and govern such actions arising under this act.

55-606. Petition for rehearing; actions against commission; abstract to be filed; transcript; appeals to supreme court. Any action for judicial review of any rule, regulation, order or decision of the commission may be brought against the commission in the district court of any county in the state wherein the property affected thereby is located, or, if the property affected thereby is located in different counties, then the jurisdiction shall lie in either of such counties. Before any such action may be brought by a person who was a party to the proceeding resulting in the making of a rule, regulation, order, or decision of the commission, a petition for rehearing shall first be filed with the commission within ten days from the date of the making of the rule, regulation, order, or decision in question. A rehearing shall be granted or denied by the commission within ten days from the date said petition is filed and if rehearing be not granted within ten days it shall be taken as denied. If rehearing be granted the matter shall be set for hearing as promptly as shall be convenient, and shall be determined by the commission within thirty days after the same shall be submitted. Such action may be brought by any person aggrieved, whether or not such person was the applicant for rehearing, within thirty days after the denial of the petition for rehearing, or, if rehearing is granted, then within thirty days after the final decision by the commission. If no petition for rehearing be filed, then any person aggrieved who shall not have been a party to any such proceeding before the commission may bring an action for the judicial review of any such rule, regulation, order, or decision of the commission at any time after ten days and within thirty days from the date of the making of such rule, regulation, order or decision. Any rule, regulation, order or decision of the commission may be superseded by the district court upon such terms and conditions as it may deem proper.

All actions brought under this section shall have precedence in any court and on motion shall be advanced over any civil cause of different nature pending in such court, and such action shall be tried and determined as other civil actions. In any such action an abstract of the record of all evidence and proceedings before the commission shall be filed by the complaining party and a counter abstract may be filed by the commission or any other interested party. The district court may, when it deems it necessary and in the interest of justice, remand any such action to the commission with directions that the same be further investigated or additional evidence taken by the commission. After making such further investigation or receiving such additional evidence the commission may change, modify or set aside the rule, regulation, order or decision in question, and if the party who instituted the action for review in the district court shall not be satisfied with such decision, then upon written request of any such party, the commission shall make a report of its further investigation and final decision and send a certified transcript of such additional evidence as may have been tendered by any party in interest to the district court and thereupon the district court shall proceed to hear and determine the action upon the complete record. The court shall not be bound by any finding of fact made by the commission. The authority of the court shall be limited to a judgment either affirming or setting aside in whole or in part the rule, regulation, order or decision of the commission. Appeals to the state supreme court may be taken from the judgment of the district court as in other civil actions. Nothing herein shall be construed in any manner to change, restrict, prohibit, or to deny to any person any of the usual equitable remedies.

APPENDIX I

55-703. Production regulations; rules and formulas. Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: Provided, however, That the daily takes of gas from any well in an unprorated gas pool shall not exceed twenty-five percent (25%) of its open flow: Pro-

vided further, however, That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand.

MOTION TO DISMISS

Office-Supreme Court, U.S.
FILED
FEB 12 1962
JOHN F. DAVIS, CLERK

No. [redacted] 62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 659

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Pursuant to Rule 16, Paragraph 1(b), of the Rules of this Court, appellee, the State Corporation Commission of the State of Kansas, moves to dismiss the appeals filed herein on the ground that they do not present a substantial federal question.

QUESTION PRESENTED

Whether the Natural Gas Act deprives the State of Kansas of the authority to prevent drainage and thus protect the correlative rights of owners of natural gas resources within the State by requiring all purchasers from common sources of supply to take gas ratably from all of the wells to which they are connected.

STATUTES, ORDERS AND RULE INVOLVED

The Order of the State Corporation Commission found valid by the Kansas Supreme Court in Case No. 42,128 (R. 76-78)[1] provides in pertinent part as follows:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field."

The Order and Rule of the State Corporation Commission found valid by the Kansas Supreme Court in Case No. 42,127 (R. 94-98) provide in pertinent part:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960. * * *
>
> RULE 82-2-219
>
> RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY.
>
> "In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall main-

[1] This case comes to this Court on two separate records. Except as otherwise noted, in order to avoid unnecessary duplication the citations to the record in this motion will be only to the record in Case No. 42,127, wherein is incorporated a large part of the record in Case No. 42,128.

tain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959 Supp., 55-703; effective February 8, 1960)."

The Kansas statutes upon which the aforesaid Orders and Rule of the State Corporation Commission are based (G.S. 1961 Supp., 55-703 and G.S. 1949, 55-704) are set forth in Appendix A.

STATEMENT OF THE CASE

This litigation involves the validity of an exercise of state regulatory authority precisely like that sustained in *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas*, 358 U.S. 37, against the same kind of challenge that is made here. As Texas had done in the *Permian* case, so here Kansas has moved to prevent drainage and thus protect the correlative rights of owners of natural gas resources within its borders by requiring purchasers of natural gas from common sources of supply in Kansas to take ratably from wells in those common sources. This requirement means only that there may not be discrimination among wells by the taking of disproportionately high or low volumes of gas from any well. It does not provide that any purchaser must take any particular volume of gas, or indeed any gas, from any field, and it does not establish or otherwise regulate the price to be paid for any gas.

In the *Permian* case this Court rejected the contention that as a matter of federal law a state may not

validly require ratable taking by natural gas companies which are subject to the jurisdiction of the Federal Power Commission, and granted a motion to dismiss the appeal for want of a substantial federal question. The federal question which appellant seeks here to raise is no more substantial and indeed is identical.

Appellant is a "natural gas company" which takes gas from the wells of numerous producers in the Kansas Hugoton Gas Field. (R. 37-38) Until 1958 its taking of gas was generally ratable as among these wells. (R. 54-56) In that year, however, appellant began to take from the wells of one favored producer the full allowables allocated thereto by the Kansas Corporation Commission, and at the same time to take from the wells of all the other producers very substantially less than their allowables. (R. 54-58, 60-62, 68-69, 174-176) This discrimination by appellant among producers in a common source of supply resulted in drainage and a violation of correlative rights. It was this situation which the orders and rule challenged in this case were designed to remedy.

The factual background of this litigation is as follows: On December 21, 1945, Northern Natural Gas Company (hereafter "Northern") as buyer, and Republic Natural Gas Company (hereafter "Republic") as seller, executed a gas purchase contract covering certain gas reserves in the Kansas Hugoton Gas Field. (R. 38-42, 117-145) The 1945 contract was amended by the parties on June 30, 1953. (R. 146-168) The basic contract of December 21, 1945, as amended in 1953, will hereafter be referred to as the "Republic A contract" and the wells covered by the contract as

the "Republic A wells". This contract contains a provision which expressly subjects the rights of the parties to all present and future valid orders, rules and regulations of any regulatory body of the state or federal government. (R. 59, 145)

On September 9, 1949, Northern, as purchaser, entered into a contract with Cities Service Oil Company for the purchase of a substantial volume of gas to be produced by the latter company from wells also located in the Kansas Hugoton Field. (R. 45-49) At various times from 1938 to the present Northern has also entered into gas purchase contracts for additional supplies of gas in the Kansas Hugoton Field from various producers other than Republic and Cities Service. (R. 45-46) These latter contracts, for the most part, involve fewer wells than are covered in either the Republic A contract or the Cities Service Oil Company contract. (R. 46)

The Republic A contract provides in substance that Northern is to take from the Republic A wells that volume of gas necessary to supply 60% of the requirements of Northern's Omaha District. (R. 40-42) By 1947 this quantity of gas had come to exceed the allowables assigned by the Kansas Corporation Commission to the Republic A wells. (R. 44) This situation led to litigation, and in *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708 (1952), the Supreme Court of Kansas ruled that the Republic A contract was necessarily subject to allowable orders issued by the Corporation Commission. Accordingly, the court held that Northern was contractually obligated to take from the Republic A wells only the amount of the allowables assigned to

those wells even if that amount was smaller than the amount specified in the contract.

Since this decision Northern has taken from the Republic A wells the full allowables allocated to them by the State Corporation Commission. (R. 45) Starting in 1958, however, it began to take from the other wells to which it is connected in the Hugoton Field substantially less than the allowables assigned by the Commission to those wells.[2] (R. 58) Thus Northern was taking gas from the Republic A wells at a much greater rate than from the other wells to which it is connected.[3]

---

[2] Although Northern's contracts with these other producers provide for ratable taking, the contracts specifically subordinate that obligation to the provisions of the Republic A contract. Exhibit 6 (the ratable take provisions in the Cities Service Oil Company contract) is typical of the ratable take provisions in all of the other contracts under which Northern buys gas in the Hugoton Field. (R. 47-48)

[3] An example of the lack of ratable taking by Northern is found in comparing takes from Cities Service wells with takes from Republic A wells. In January 1959 the Cities Service wells connected to Northern's lines had a monthly allowable of 2,084,874 Mcf. They had an underage of 11,411,727 Mcf and 123,711 Mcf of these underages were cancelled by the Commission under its general rules as being underproduced in excess of six times the January current allowable. Northern's other connections, aside from Republic A wells, had a January current allowable of 9,309,441 Mcf and a total underage of 48,604,070 Mcf. The net status of these wells was 522.09 per cent *underproduced*, and they suffered cancellations of 409,393 Mcf of the aforementioned underage. In contrast, Republic A wells had a current January allowable of 2,674,390 Mcf and an overage of 114,858 Mcf and were *overproduced* 4.29 per cent in that month. Comparison of the 522.09 per cent underage of the other wells with the 4.29 per cent overproduction of Republic A wells shows the gross lack of ratable production from these two groups of wells in the Kansas Hugoton Gas Field. (R. 174-176) See also R. 54-58, 60-62, 68-70.

As a result of Northern's failure to take gas ratably from all of the wells in the field to which it was connected, drainage across lease lines occurred, and the correlative rights of producers other than Republic were injured and prejudiced by an escape of gas from their leases to those of Republic.[4] (R. 68-73, 174-176)

On October 7, 1959, the State Corporation Commission, having heard extensive testimony and having received voluminous evidence, ordered Northern to take gas ratably from all wells to which its pipeline system is connected in the Kansas Hugoton Gas Field. (R. 76-78) Subsequent thereto, and after due notice and hearing, the Commission issued an order and accompanying rule, effective February 8, 1960, directing every purchaser of gas in Kansas, including Northern, to take gas ratably from its connections in each common source of supply under proration by the Commission. (R. 94-98)

On April 8, 1960, the Kansas District Court affirmed the Orders and Rule of the State Corporation Commission. (R. 88-89, No. 42,128; R. 109-110, No. 42,127) Thereafter the Kansas Supreme Court, in Case No. 42,128, affirmed the lower court's decision uphold-

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[4] An expert witness testified: "In comparing that we see that Northern Natural Gas Company, excluding Cities Service Oil Company and Republic "A" connections, had 522.09 (percent underproduction); Republic Natural Gas Company (Group "A"), 4.29; and with the Cities Service Oil Company's connections, 547.36 percent. To have everything ratable here, each one of these figures should be around 425.77 percent underproduced. • • • I have expressed an opinion that there is drainage occurring. Our studies indicate that if the wells are produced with the same percent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected." (R. 175-176)

ing the validity of the Commission's order requiring Northern to take gas ratably in the Kansas Hugoton Field. (R. 153-167, No. 42,128) The Court also, in Case No. 42,127, affirmed the lower court's decision upholding the validity of the Commission's Order and Rule directing all purchasers of natural gas to take gas ratably from each common source of supply under proration in Kansas. (R. 180-184, No. 42,127) Northern's petitions for rehearing in the Kansas Supreme Court were denied. (R. 181-184, No. 42,128; R. 200, No. 42,127)

ARGUMENT

The only question raised by this appeal—whether the Natural Gas Act (15 U.S.C. § 717 *et seq.*) deprives the states of their historic authority to protect the correlative rights of owners of natural gas resources by regulation designed to assure ratable production from wells in a common source of supply—has already been presented to this Court and found to be insubstantial. In *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas,* 302 S.W. 2d 238 (Tex. Civ. App. 1957), *appeal dismissed,* 358 U.S. 37, there was at issue a Railroad Commission order relating to the Puckett-Ellenburger Gas Field, providing in part (302 S.W. 2d at p. 245):

> "Each common purchaser of gas connected to wells in said field is required to take ratably in accordance with the percentage allowable factors established by the Commission and is required to maintain all of the prorated wells connected to its facilities in substantially the same percentage status as to overproduction and underproduction."

The facts that led to the promulgation of the order involved in the *Permian* case, and the contentions of

the appellant there, were in substance identical to those in this case. Permian was, like Northern, a "natural gas company" within the meaning of the Natural Gas Act.[5] As is the case with Northern, its purchases of natural gas in the field were made under contracts on file with the Federal Power Commission and the prices established in the contracts were subject to regulation under the Natural Gas Act. Permian took gas disproportionately as among producers in the field, just as here Northern has taken disproportionately as among the Republic A wells and its other connections in the Kansas Hugoton Field. As Northern attempted to do in this case, Permian sought to justify its favoritism of one producer as against others on the basis of its contractual arrangements with the various producers, which provided for the taking by Permian of a certain volume from the favored producer and further provided that Permian's obligation to take ratably under its contracts with the other producers was subordinate to this arrangement with the favored producer. Finally, Permian claimed, as Northern claims here, that the effect of the Commission order would necessarily be to force it either to take less from the favored producer than required by contract, thereby subjecting it to potential liability to that producer, or to increase its purchases from the other producers in the field to a level greater than its needs. See Jurisdictional Statement, No. 64, Oct. Term 1958.

The Texas court, in considering Permian's contention that the State was without authority to require it

[5] Indeed Permian, which unsuccessfully raised before this Court the very point upon which Northern here relies, was at the time of the Permian case a subsidiary of Northern and in December 1960 was merged into the latter company.

to take ratably from wells in the common source of supply where it purchased, referred to the authority of the Railroad Commission under the Texas statutes to prorate and regulate gas well production from a common source for the prevention of waste and the protection of correlative rights. The Court noted that in order for the Commission effectively to discharge its statutory duties it was essential that it be able to make orders resulting in ratable production, and that this was the purpose and effect of the challenged order. The Court stated (302 S.W. 2d at p. 253):

> "Ratable production and ratable take or purchase are essential in preventing drainage between leases * * *. The orders involved herein were adopted to bring about ratable production of gas in the field and the requirement that appellee as a common purchaser purchase ratably is for the purpose of insuring ratable production, and only require [sic] appellee to purchase ratably."

As above noted, on appeal to this Court Permian contended *inter alia* that the ratable taking order conflicted with the Natural Gas Act and was therefore void. The Railroad Commission filed a motion to dismiss for want of a substantial federal question, pointing out that the states' authority to regulate production of natural gas by requiring ratable taking had long been recognized and that no reasonable basis existed for contending that the Natural Gas Act had deprived the states of this authority. The motion was granted by this Court.

In thus rejecting the contention that the Natural Gas Act deprives the states of the authority to require the ratable taking of natural gas from common sources

of supply to prevent drainage and protect correlative rights, this Court did no more than apply established principles of law. It is well settled that the Natural Gas Act was not designed to supplant or to destroy state regulatory jurisdiction in areas which the states were recognized at the time of the Act's passage as being constitutionally capable of regulating. Rather, that statute was intended only to fill the "gap * * * thought to exist at the time the Natural Gas Act was passed" by providing federal regulation of those aspects of the natural gas business which the states were at the time of that passage believed to be constitutionally unable to regulate. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684, 685-687. This interpretation of the scope of the Act is squarely supported by the unequivocal statement in the House Committee Report on the bill (H.R. Rep. No. 709, 75th Cong., 1st Sess., p. 2):

> "The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority * * *."

See also *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503, 512-513; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 690.[6]

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[6] This is not, of course, to say that the Natural Gas Act permits regulation by the states in all the areas in which, under constitutional standards *now* prevailing, they would be free to act in the absence of conflicting federal regulation. As was pointed out in Phillips (347 U.S. at p. 684):

> "* * * it is well settled that the gap [which the Natural Gas Act was intended to fill] * * * is that thought to exist at the time the Natural Gas Act was passed, and the juris-

At the time of the passage of the Natural Gas Act, it had long been firmly established that the authority of the states to insure by appropriate regulation the prevention of drainage and waste and the impairment of correlative rights of owners of natural gas resources could be exercised consistent with the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 22; *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210; *Walls* v. *Midland Carbon Co.*, 254 U.S. 300, 323; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61; *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190. And this Court has held that this established authority included the right to require ratable taking. In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 185, the Court said:

> "This Court has upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking, Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932) * * *."[7]

That the ratable take orders and rule here involved were designed to prevent drainage and protect correl-

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diction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate commerce, in the absence of conflicting federal regulation."

It is for this reason that this Court was able to hold in 1950 that the Commerce Clause did not forbid state minimum price orders applying to sales of natural gas in interstate commerce (Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179) and shortly thereafter to hold (Natural Gas Pipeline Co. v. Panoma Corporation, 349 U.S. 44) that this kind of regulation was nevertheless inconsistent with the Natural Gas Act.

[7] The Champlin case was decided three years prior to the passage of the Natural Gas Act.

ative rights is clearly shown in the opinion of the Supreme Court of Kansas in this case. As that Court noted (R. 156, No. 42,128):

> "We do not read the record to show that there is any contention but that drainage was occurring, and that the underproduced wells were losing the right to produce gas from the common source of supply to the great damage of the owners of the wells in the loss of their correlative rights.
>
> "While the members of this court make no claim to be experts in the science of the production of natural gas, we believe that the court may take judicial notice of the fact that where natural gas is within the earth in one common source and is under pressure, if one gas well is allowed to take gas, this will result in the pressure being lowered around the vicinity of this gas well so that the gas in the common source will tend to drain or rush to the vicinity of the well taking gas. The result will be that the other wells in the common field of source will be able to produce much less gas and the owners of such wells will have suffered a definite loss"[8]

[8] That orders requiring ratable purchase are designed to protect the correlative rights of producers in a common source of supply has also been recognized by an eminent authority in the field of oil and gas law:

> "Statutes making pipe line companies common purchasers of oil and gas are, in purpose and effect, conservation measures, and so operate, whether the production of oil or gas from a common source of supply is or is not restricted and prorated among the wells therein for the prevention of waste. Courts in most of the oil and gas producing states have held that a state may validly legislate for the prevention of waste of oil and gas and for the protection of the correlative rights of owners and lessees, in a common source of supply. Legislative enactments and judicial opinions have repeatedly stated that conservation measures and the orders and regulations of conservation agencies should be such as to afford the owner of each tract of land in a common source of supply of oil or gas the opportunity to produce his just and equitable

Accordingly, since it is clear that at the time of the passage of the Natural Gas Act the constitutional authority of the states to require ratable taking from common sources of supply to prevent drainage and protect correlative rights was well established, it follows that appellant's contention that the Act should be construed to deprive the states of this authority is without substance.

Appellant argues that because the orders and rule which it challenges operate upon natural gas which is to be sold in interstate commerce for resale, those regulations necessarily encroach unlawfully upon an area of exclusive federal jurisdiction. The difficulty with this argument is that if accepted it would invalidate not only the orders here, but every state proration order restricting production from gas leases if the gas from those leases had theretofore been dedicated by contract to the interstate market. Appellant expressly concedes, as it must, that nothing in the Natural Gas Act prevents this kind of state proration "for purposes of conservation and protection of correlative rights" (Juris. Statement, p. 16, n. 16), and with this concession its arguments fall.[9]

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share of the oil or gas therein and to use therefor his just and equitable share of the reservoir energy. Unless all the producers in a common source of supply have equal opportunity to sell or to transport oil and gas from their wells, they are not afforded the opportunity to produce their just and equitable share of the oil or gas or to utilize their just and equitable share of the reservoir energy." (4 Summers, *The Law of Oil and Gas*, perm. ed., Sec. 754, p. 182.)

[9]Appellant's suggestion that the exercise of state power here involved is invalid because the "production or gathering" exemption of Section 1(b) of the Natural Gas Act (15 U.S.C. § 717(b)) does not apply to sales of natural gas in interstate commerce for resale (Juris. Statement, pp. 22-23) misconceives both the char-

It is to be emphasized that the challenged orders and rule do not in any way touch upon the price which Northern is to pay for the gas which it purchases, a matter which is within the exclusive jurisdiction of the Federal Power Commission.[10] For that reason cases such as *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, and *Michigan Wisconsin Pipe Line Co.* v. *Corporation Commission of Oklahoma*, 355 U.S. 425, holding that the states cannot validly fix minimum prices for natural gas sold in interstate commerce for resale, are not in point. The decisions cited by appellant dealing with the authority of the Federal Power Commission to grant certificates of convenience and necessity for facilities used for the transportation or sale of natural gas in interstate commerce or with the authority of the Commission to regulate other incidents of contracts for the sale of natural gas in interstate commerce (*e.g.*, *Federal Power Commission* v. *Transcontinental*

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acter of that state power and the fundamental reason why its exercise is valid. Kansas is not attempting to regulate sales in interstate commerce; it is regulating the production and taking of natural gas to prevent drainage and thus to protect correlative rights. In addition, as we have shown, the Natural Gas Act does not deprive the State of this power because it is a power that the State could constitutionally have exercised under the decisions of this Court prior to the passage of the statute. The latter point finds support in, but does not depend upon, the "production or gathering" exemption of Section 1(b), which marks a limit on federal regulatory power but which does not attempt to specify all matters that the statute leaves to the regulatory powers of the states.

[10] The record is devoid of any evidence that the orders or rule have affected or will affect in any way the price at which gas is sold or purchased. Indeed a witness for appellant, when specifically asked whether those orders or that rule, or the orders of the Federal Power Commission, affect the price of gas, responded only that the latter orders have such an effect. (R. 67-68)

Gas Pipe Line Corp., 365 U.S. 1; *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170; and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137) are equally wide of the mark, since those cases in no way were concerned with the ratable taking of natural gas. The orders and rules here involved do not direct appellant to purchase any particular volume of gas nor do they otherwise impinge upon any matters which are subject to the exclusive regulatory authority of the Federal Power Commission.[11] As the Supreme Court of Kansas stated in its opinion denying rehearing (R. 183, No. 42,128):

> "This case involves nothing to our knowledge which has anything to do with the price paid by the purchaser for gas, nor how much gas he buys. The only matter here involved is whether the taker must take ratably from all wells to which he is connected and thus preserve the rights of the land owners."

Northern's suggestion that compliance by it with the orders and rule of the Commission will subject it to contractual liability to Republic—a contention identical to that made by the unsuccessful appellant in the *Permian* case, *supra*—is both without substance and irrelevant. The Supreme Court of Kansas noted

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[11] In its Jurisdictional Statement (p. 25) Northern asserts that the orders and rule are designed "to force Northern to increase its purchases of gas from the wells to it connected in the Kansas Hugoton Gas Field, beyond the amount of gas it requires therefrom to satisfy its interstate markets and in excess of its contractual obligations to producers to it connected in the field." This statement is baseless. The orders and rule do not require Northern to take any gas whatsoever from the field; they provide only that to the extent that Northern does take gas it must do so in a manner which does not discriminate among producers and encroach upon correlative rights.

that the contract between Republic and Northern is expressly made subject to "all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction", and indicated that accordingly the contractual obligations of the parties are *pro tanto* modified by the regulations here challenged (R. 158-159). See also *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708 (1952). In any event, it is settled that persons are not exempt from otherwise valid regulation simply because they have previously entered into contractual undertakings which are inconsistent with the regulatory scheme. See, *e.g.*, *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349.

CONCLUSION

For the foregoing reasons and on the authority of *Permian Basin Petroleum Co.* v. *Railroad Commission of Texas*, 358 U.S. 37, these appeals should be dismissed.

Respectfully submitted,

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February 12, 1962

APPENDIX A

Statutes Involved

Kansas G.S. 1961 Supp. 55-703 provides:

"Production regulations; rules and formulas. Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corperation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: Provided, however, That the daily takes of gas from any well in an unprorated gas pool shall not exceed twenty-five percent (25%) of its open flow: Provided further, however, That the provisions of this

act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand."

Kansas G.S. 1949, 55-704 provides:

"Rules and regulations authorized; notice and hearings. The commission shall promulgate such rules and regulations as may be necessary for the prevention of waste as defined by this act, the protection of all water, oil or gas-bearing strata encountered in any well drilled in such common source of supply, ascertaining the several factors entering into the determination of the productive capacity of each well, the total productive capacity of all wells in the common source of supply, the establishment of such other standard or standards as the commission may find proper to determine the productive capacity of each well and of all wells in such common source of supply, and as the commission may find necessary and proper to carry out the spirit and purpose of this act: Provided, however, That notice, as provided in section 8 [55-706] of this act, shall be served upon or given to the producers and purchasers of natural gas and all other persons, firms or corporations interested, of any hearing or hearings which may be called for the purpose of establishing any facts upon which any proposed rule or regulation may be based."

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636914—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 659

NORTHERN NATURAL GAS COMPANY, A CORPORATION, APPELLANT

v.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

This memorandum, on behalf of the Federal Power Commission as amicus curiae, is filed in response to this Court's order of March 19, 1962 (369 U.S. 814). We support the view that the Court should note probable jurisdiction.

The present appeal has been taken from judgments of the Kansas Supreme Court,[1] upholding an order and rule of the Kansas Corporation Commission. The order and rule direct appellant, an interstate pipeline company subject to federal regulation under the

[1] There is a preliminary question as to reviewability not raised by the parties. The appeal is taken from two decisions of the Kansas Supreme Court, Nos. 42127 and 42128. The jurisdictional statement, at p. 3, indicates that the Kansas Commission, when it promulgated the general rule which is the subject of

Natural Gas Act, and all other purchasers in the Kansas-Hugoton gas field to take gas ratably, *i.e.*, in proportion to allowable production,[2] from every well to which each purchaser is connected in the field. It is the view of the Federal Power Commission that State action of the kind here involved exerts leverage upon interstate pipelines to purchase natural gas from one State rather than another. The action therefore enters into the field occupied by the Natural Gas Act and is invalid under the Supremacy Clause. The questions are substantial and warrant plenary consideration by this Court.

1. The entire Hugoton field (which extends also into Oklahoma and Texas) constitutes a single source of supply. None of the purchasers is required by the Kansas Commission to take ratably with any other, however; nor is there any coordination among the States involved. The requirement is that each purchaser in Kansas take ratably among its own connections within that State.

Annexed to this memorandum is a map of the entire

No. 42127, rescinded the order in No. 42128, which was directed solely to appellant. For that reason, No. 42128 appears to be moot. The same facts and questions are present in No. 42127, however. Since the rule carries criminal sanctions (Kan. Gen. Stat. § 55-708 (1949)), and since its applicability to appellant is not questioned, No. 42127 appears properly reviewable here. See *Frozen Food Express* v. *United States*, 351 U.S. 40. Nevertheless, since the decision of the Kansas Supreme Court in No. 42127 relies on the opinions in No. 42128 for a development of the facts and reasoning (J.S. App. xxxiv), the opinions in No. 42128 are relevant.

[2] The Kansas Commission, by order, limits the production of gas wells in Kansas for the stated statutory purposes of preventing unfair taking from a common source of supply and of preventing waste. See Kan. Gen. Stat. § 55-703 (1949). See also *infra*, p. 4, *et seq.*

Kansas portion of the field, which shows, with respect to each section, the pipeline or pipelines with which the wells in that section are connected. The connections of each pipeline are interspersed with those of others in such high degree that differences in rates of take between one pipeline and another must necessarily result in drainage; that is, when gas is taken at any particular rate from the wells attached to one purchaser's line, gas will flow underground toward those wells from any neighboring area—be it local or regional—in which the wells are being operated at a lower rate. With wells closely interspersed, the inevitable effect of differences in the rates of take is drainage from one to another.

In fact, in the present case, there appear to be substantial differences in the rates of take among the various purchasers in the Kansas-Hugoton field. The Kansas Commission's gas proration orders and reports show that the takes of the six leading purchasers, expressed as percentages of the allowable production of the wells with which they are connected, varied in 1961 from 81.58% to 96.43%. The year 1960 showed a comparable range, although various purchasers occupied different relative positions. Thus, the Kansas Commission's order and rule do not protect the correlative rights of adjacent landowners, but actually enforce differences in the level of purchases among neighboring wells, depending on (1) the pipeline to which the well is connected and (2) the total purchases which that pipeline happens to make in any given period; the order and rule freely tolerate inequalities in the pipelines' several rates of purchase and thereby permit continued drainage from groups of wells to neighboring groups.

2. The orders of the Kansas Commission, by requiring each pipeline to take ratably from all of its connected suppliers in the Kansas portion of the field, are calculated to make the highest rate of take, required by any of its suppliers' contracts, the floor for all purchases by that pipeline, and thereby constrain interstate pipelines to buy more gas from Kansas sources. The course of regulation by the Kansas Commission during the last several years confirms this view.

On January 22, 1958, the Commission issued a report and order changing its method of fixing allowables. Kansas State Corporation Commission, *Twenty-Fourth Biennial Report*, p. 213. Theretofore, the nominations by purchasers from the Kansas-Hugoton field of the amounts they expected to purchase during the ensuing six-month period had been considered by the Commission to be the market demand for the field (*id.* at p. 216). Stating that the Oklahoma portion of the reservoir was being depleted approximately twice as fast as the Kansas portion and the Texas portion at an even higher rate (with consequent drainage to those states from Kansas) (*id.* at p. 215), the Commission decided that, in determining market demand in the future it should consider, in addition to the nominations by purchasers, the following factors (*id.* at p. 218):

> (1) Takes from other sources of supply to which the purchasers are connected.
>
> (2) The total markets for natural gas of all purchasers from the Kansas-Hugoton Field; the rate of increase therein compared to the

rate of increase in the takes from the Kansas portion of the Hugoton Field.

The concurring opinion of Chairman Beatty emphasized the objective of increasing Kansas production at the expense of Oklahoma (*id.* at pp. 210–220):

> Intervenors have urged us to continue the practice of setting high monthly allowables which was started by the Commission in April, 1956. They have asked us to increase the allowables 25% more even though the Commission since April, 1956, has been allowing somewhat more than the market actually absorbed. This benefited pipe line companies in need of gas, usually those overproduced. It was coercive on those who did not have proportional markets, those usually underproduced. It has not been effective so far, but if and when it has the intended effect of forcing higher takes, it will allow the producers and royalty owners to convert their minerals into cash more quickly. The only visible results in the last nineteen months, however, have been no increase in takes and a gradually mounting net underage. The net allowable is now 52 million M.c.f. higher than the amount that will be actually taken and marketed this month, but if it is carried for awhile, the pipe line companies may find a market for it.
>
> * * * * *
>
> I am most heartily in favor of Kansas resources being harvested and marketed by Kansas people and Kansas industries, rather than by Oklahomans, and my sympathies are with the Kansas royalty owners, some of whom have had to sell their birthright to the pipe line

> companies for a mess of pottage (as low as 3¢ to 8¢ per M.c.f.) and are now having the pottage rationed to them in small spoonfuls, but whether we, a conservation commission, should try to force the sale and depletion of our natural gas at today's low prices, raises another question. Gas is a most desirable fuel. America's reserves of natural gas are being depleted one hundred times faster than our coal reserves. Aside from the question of our authority and jurisdiction to execute such a program under present conservation statutes, such a program may, in retrospect, prove to be very unwise, considering the welfare of the state as a whole.

Notwithstanding the recognition that the mere raising of the allowables had "not been effective so far," the Kansas Commission continued to consider factors other than the purchasers' nominations in determining the "market demand," on which allowable production from the Kansas-Hugoton field has been based. Thus, in its order of October 8, 1958,[3] determining market demand for proration purposes, the Commission found that the pipelines' nominations totalled 238,634,540 Mcf for the six months ending March 31, 1959, and that this total was lower than the nominations for the same periods of the two preceding years. It found that "the consumptive market of the purchasing pipeline companies has increased" since March 31, 1958, and noted evidence that—

[3] This and other pertinent orders discussed *infra* are in the files of the F.P.C. and will be made available to the Court, should it so desire.

> * * * if the five largest purchasers (purchasing pipeline companies) would take gas from the Kansas Hugoton Gas Field at the same rate based on comparative gas reserves as they now do from the other sources to which they are connected, the Kansas Hugoton Gas Field's fair share of the markets would be 676,904,000 Mcf for the twelve months' period. This indicates that the market demand for the next six months would be approximately 430,000,000 Mcf. * * *

The commission ultimately fixed total allowables for the six-month period at 255,000,000 Mcf.

In a similar order, dated April 22, 1959, fixing allowables for the six months from April 1 to September 30 of that year, the Kansas commission again found that the pipelines' nominations of 169,413,250 Mcf did not reflect the "fair market demand" for the Kansas-Hugoton field. Evidence showed that, if the five largest purchasers took gas from that field at the same rate relative to reserves as from their other connections, the field's share would be 241,519,000 Mcf. Evidence also showed that the Kansas-Hugoton reserves of the four leading purchasers amounted to 44% of their total reserves, but that these companies were supplying only 23% of their over-all markets with Kansas-Hugoton gas. Although evidence as to drainage of gas from Kansas into Oklahoma was conflicting and inconclusive, the total allowables were fixed at 175,000,000 Mcf, or 5,586,750 Mcf above the pipelines' nominations.

In another order, dated November 10, 1959, fixing

allowables for the six months to March 31, 1960, the Commission said:

> Nominations and runs are often controlled or influenced by contracts between the producers and purchasers. These contracts do not necessarily bear any relationship to the market demand for gas from the Kansas Hugoton Gas Field or any gas field, and they are not binding upon the Commission in carrying out its regulatory duties.

In each subsequent proration order, the "market demand" has been based on considerations similar to those stated in the orders discussed above, and each time allowables have exceeded the nominations of the pipelines. Each order has contained findings that the Commission is not bound by the contractual relationships between producers and purchasers; that the Kansas-Hugoton field is not getting its fair share of the purchasers' markets; and that purchases have been lower, in proportion to reserves, in Kansas-Hugoton than over-all.

The ratable-take order here involved supplied the element that was missing in the Kansas Commission's previous attempts to force more Kansas gas into the interstate market by merely raising the allowables, or ceilings. The ratable-take order involved in the present case, in effect, established a floor for each purchaser by requiring him to take from all his connected wells at the highest rate at which he was obligated to take from any of them. Under the order, Northern will be required to take the same percentage of the allowable for each connected well that it is required

to take from the "Republic 'A' " wells under its contracts with that supplier. Northern will therefore presumably have to increase substantially its rate of take from its other suppliers in Kansas and reduce its take from its suppliers in other states.

3. From the foregoing, it is evident that the order and rule here in issue do not regulate such matters as "the drilling and spacing of wells" (*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 603), or "the physical activities, facilities, and properties used in the production and gathering of natural gas" (*Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678)—subjects which are concededly within the control of the States. Nor does it appear that *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas*, 358 U.S. 37, on which appellee relies, is apposite. That case concerned a field located wholly within a single county in Texas, and involved the proper allocation of production within the county so as to prevent discrimination among producers on the part of the owner of the only available gas processing plant. The total amount of gas flowing into interstate commerce was not in issue; nor was its price affected by the order there under review.

On the other hand, the order and rule here in issue directly affect the relative volume or amounts of gas being sold in interstate commerce by the several States. Moreover, to the extent that the Kansas Commission's action constrains interstate pipelines to alter their takes of gas from different wells—both

those located in Kansas and those located in other States—the action has direct impact upon the cost of gas to the pipelines and to the ultimate consumers.[4] See *Phillips Petroleum Co.* v. *Wisconsin, supra,* 347 U.S. at 685; *Cities Service Co.* v. *State Comm. of Kansas,* 355 U.S. 391.

To acknowledge that drainage knows no State lines and that Kansas may have cause for concern when production in adjoining States from this multi-state reservoir occurs at a more rapid rate than production in Kansas does not mean that each of the several States is empowered to adopt measures which exert leverage upon interstate pipelines to take increased quantities from that State. If each State did that, interstate pipelines might well be required to take and pay for more gas than they can sell—a consequence which would obviously place heavy burdens upon interstate commerce. It is not our purpose in this memorandum to attempt to explore all of the ramifications of

[4] Because the pipelines' obligations to deliver gas are of long duration, they must ordinarily make long-term contracts with their suppliers to assure themselves of adequate reserves and deliverability. Kansas-Hugoton is one of this country's older fields, though it still contains large reserves. Contracts in more recently developed areas, including the Oklahoma portion of the Hugoton field, frequently provide for minimum takes by the pipeline. Northern's "Republic 'A'" contract and most of its contracts outside of Kansas (but not its other Kansas-Hugoton contracts) contain minimum-take provisions. To the extent that the actions of the Kansas Commission divert appellant's purchases from suppliers whose contracts so provide, whether in Kansas or elsewhere, the actions expose appellant to contract penalties which affect the unit price of the gas it buys.

a complex problem in federal-state and interstate relationships, but, rather, to point out that the present case raises issues of a quite different order from those presented in the cases cited above. The questions, in our view, are substantial and warrant full review by this Court. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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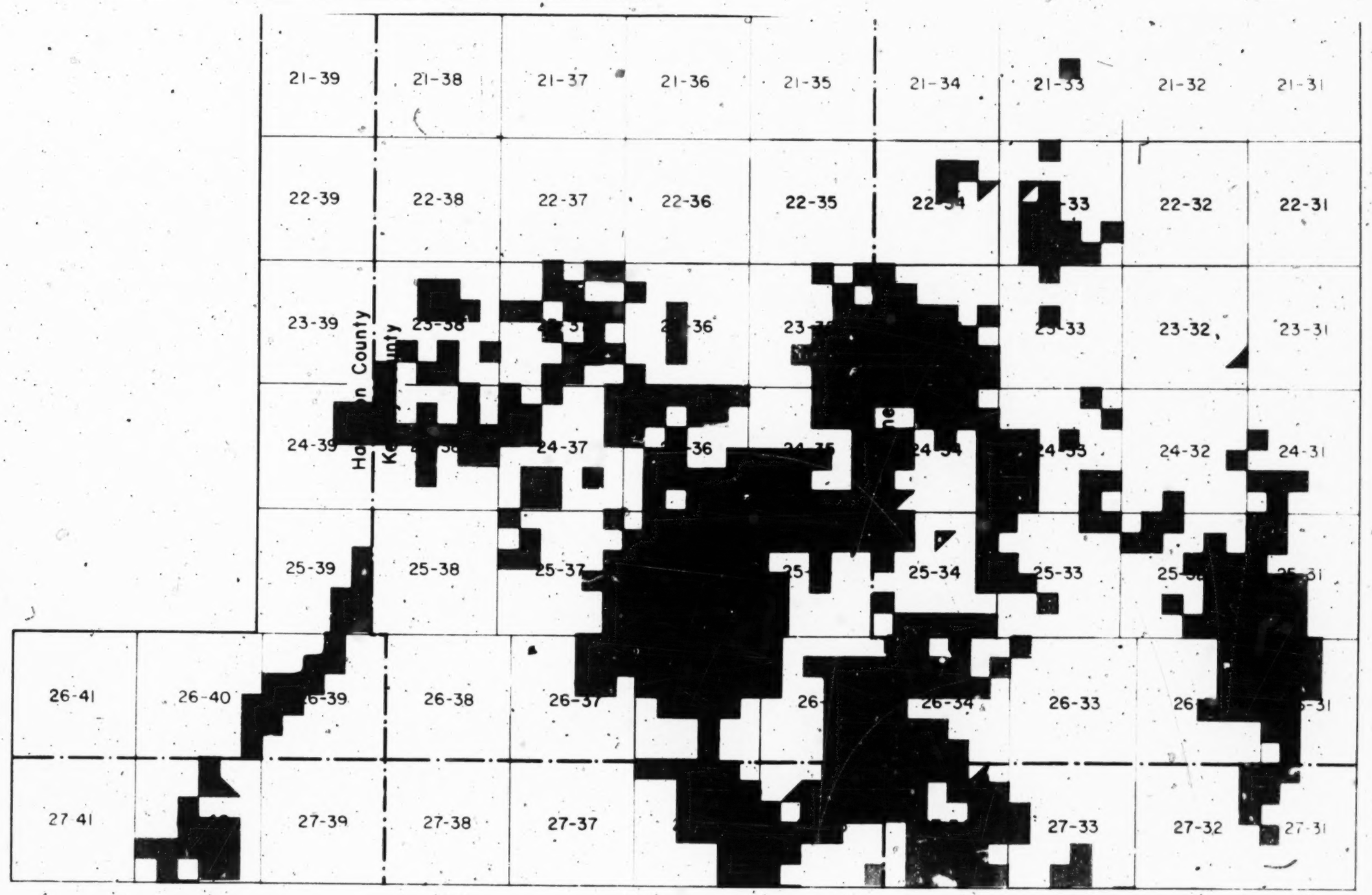
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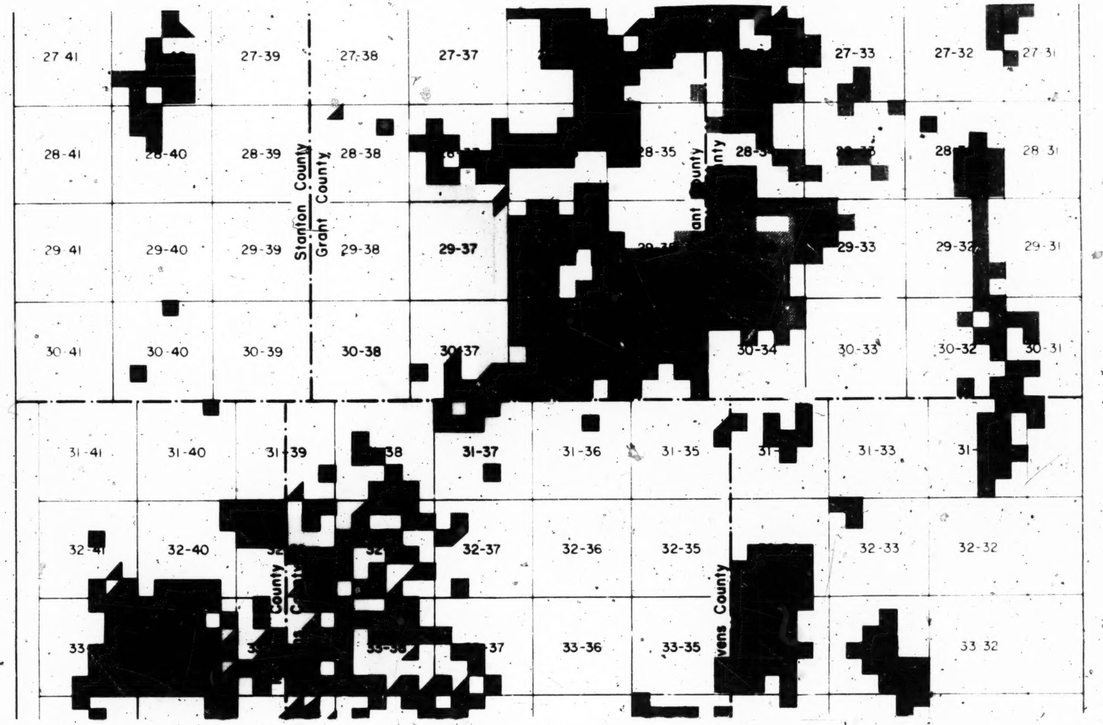
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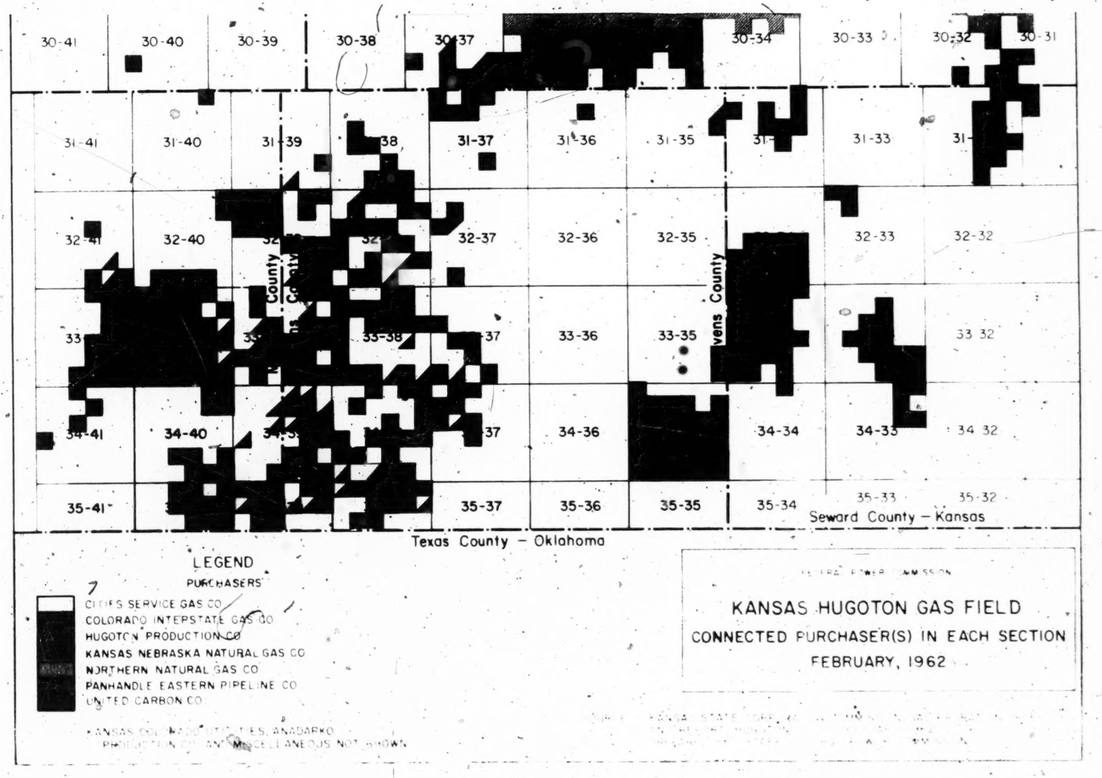
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PURCHASERS
CITIES SERVICE GAS CO.
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PANHANDLE EASTERN PIPE LINE CO.
UNITED CARBON CO.
KANSAS CORPORATION COMMISSION
KANSAS HUGOTON GAS FIELD
CONNECTED PURCHASER(S) IN EACH SECTION
FEBRUARY, 1962

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 62

NORTHERN NATURAL GAS COMPANY,
a Corporation,
Appellant,
VERSUS
THE STATE CORPORATION COMMISSION OF
THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF KANSAS.

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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Contractual and Property Rights as Affected by Conservation Rules and Regulations, published in 10th Annual Institute on Oil and Gas Law and Taxation by the Southwestern Legal Foundation, Dallas, Texas, at page 1 and particularly pages 13 through 15, by Richard C. Byrd, Commissioner (now Chairman), Kansas Corporation Commission 15

Kansas Commission General Gas Conservation Rule 82-2-201, unnumbered para. 6 6

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 659

NORTHERN NATURAL GAS COMPANY,
a Corporation,
Appellant,

VERSUS

THE STATE CORPORATION COMMISSION OF
THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

Appellee has filed herein its Motion to Dismiss, but in support thereof has demonstrably changed the Question Presented, has misinterpreted the effect of the challenged regulations and has relied upon a decision which is clearly distinguishable.

If these appeals (as appellee asserts) were cases attacking as invalid and unconstitutional orders of the Kansas Corporation Commission limited only to securing the ratable production of natural gas by limitations placed on

producers of gas in the Kansas Hugoton Gas Field and promulgated by such Commission for the purpose of accomplishing a lawful state objective, that of preventing waste of natural gas and the protection of the correlative rights of owners of such gas in that field, these appeals would not have been filed. These cases and each of them, however, do not fall within that category. As clearly stated on page 7 of appellant's Jurisdictional Statement, the question presented in each of these cases to this Court is:

> "Does the State of Kansas have jurisdiction, under the guise of regulating production and in the face of the provisions of the Natural Gas Act and Federal Power Commission regulations thereunder, to control the sale of natural gas in interstate commerce for resale after the production and gathering thereof has ended, by directing a natural gas company purchaser, operating under subsisting gas sales contracts with its producers, to make its purchases in a manner or at a rate contrary to such contracts which are on file with the Federal Power Commission as effective rate schedules and on which certificates of public convenience and necessity authorizing such sales have been issued?"

Appellee in its Motion to Dismiss, in lieu of facing the reality of the situation and endeavoring to make answer to the real question before this Court, as posed by appellant in its Jurisdictional Statement and as set out *supra*, has deliberately, without justifying authority and unsupported by logic or reason, reframed the question presented to this Court by stating, on page 1 of such Motion to Dismiss, its own version of what it likes the question to be, namely:

"Whether the Natural Gas Act deprives the State of Kansas of the authority to prevent drainage and thus protect correlative rights of owners of natural gas resources within the state by requiring all purchasers from common sources of supply to take (purchase) gas ratably from all of the wells to which they are connected?" (Insert supplied.)

Appellee cleverly rephrases appellant's argument but in so doing misstates the actual effect of the challenged regulations. For example, on page 14 of its Motion to Dismiss, appellee states: "Appellant argues that because the orders and rules which it challenges operate upon natural gas *which is to be sold* in interstate commerce for resale, those regulations necessarily encroach unlawfully upon an area of exclusive federal jurisdiction." (Emphasis supplied.) But as appellee is (or should be) aware, these challenged regulations on their face act upon the purchase of gas, and perforce the sale of such gas in interstate commerce for resale (R. 15, 42, 84-98, 127). Necessarily, the gas in question is not gas which is to be sold, but gas which has been actually sold, the sale having already taken place. This point certainly did not escape the Kansas Supreme Court when it stated (incorrectly as we believe) that the object of the Kansas Production Statute "cannot be accomplished unless the taker or purchaser can be controlled" (R. 42, 128-158).

The apparent objective of appellee, in undertaking to reframe the question presented to this Court by appellant, is to justify, if possible, its assertion made at the outset of its Motion to Dismiss (page 3) that:

> "This litigation involves the validity of an exercise of state regulatory authority *precisely like* that sustained in *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas* (1958), 358 U.S. 37, 3 L. Ed.2d 43, 79 S. Ct. 21, against the same kind of challenge that is made here." (Emphasis supplied.)

Appellee labors under the impression that because this Court in the *Permian* case dismissed the appeal from the Texas Court, or, as the case may be, denied certiorari without setting forth its reason therefor,[1] that the decision of this Court is therefore determinative as to the merits of these cases. Appellant here notes that had such been the purpose of this Court it would have dismissed the Texas appeal "for want of a substantial federal question," as it did in several other appeals disposed of by per curiam opinion on the same day the *Permian* case was decided. This Court has frequently reiterated in so many cases that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, that citation of authority therefor is unnecessary.

In the *Permian* case, this Court had before it for review the judgment and decision of the Court of Civil Appeals of Texas, Third Supreme Judicial District (1957), 302 S.W.2d 238. That Court, by its judgment and decision, had reversed the judgment of the 98th District Court of Travis County, which Court had in turn entered judgment granting temporary and permanent injunctions against the Railroad Commission of Texas, declaring invalid and prohibiting the enforcement of certain orders of the Railroad

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[1] MR. JUSTICE BLACK was of the opinion that probable jurisdiction should be noted.

Commission of Texas dealing with the ratable production and purchase of natural gas in the Puckett-Ellenberger Field in Pecos County, Texas.

Permian Case Not Comparable to Cases at Bar

A careful perusal of the opinion of the *Texas Permian Basin Pipeline Co.* case, *supra*, discloses characteristics and features that distinguish that case from these appeals and makes the *Permian* case not here controlling. Those distinctive characteristics and features are:

1. The *Permian* case dealt with a common source of supply of natural gas exclusively in Texas wherein Permian was the principal purchaser in the field. In the case at bar there is involved a single interconnected common source of supply—an interstate gas field, the Hugoton Field, one of the largest in the world, which is located in portions of three states—Kansas, Oklahoma and Texas, with numerous purchasers therein: The well established rule recently reiterated by this Court in *U. S. v. Louisiana*, 363 U.S. 1, 33, 4 L. Ed.2d 1025, 80 Sup. Ct. 961, that a land boundary between two states marks the place where the full sovereignty of one state ends and that of another begins, points up very clearly the impact and difficulty encountered in the interstate marketing of gas from such a single interconnected interstate gas field, or common source of supply, where three different state agencies possess the power of regulation therein. This is particularly true when one state in the interstate field wants to conserve its gas while another state decides that its program is to force a speedy depletion of the field. *F.P.C. v. Transcontinental Gas Corp.* (1961), 365 U.S. 1, 20, 5 L. Ed.2d

377, 390, 81 Sup. Ct. 435. The problem becomes more acute when it is recognized that for regulatory purposes the portion of this interstate field lying within each of the respective states, for the purposes of state regulation, is a separate common source of supply and under the exclusive jurisdiction of each such state. *G.S. Kan, 1949, 55-702*, Kansas Commission General Gas Conservation Rule 82-2-201, unnumbered paragraph 6.

The facts that the same pipelines and purchasers do not serve or purchase gas from each separate state portion of the interstate field, that the respective pipeline purchaser's lines are of different capacities, and the market demand or requirement for gas from each such separate portion of the field to satisfy the interstate markets of each of the respective pipeline purchasers therein is different, make the application of separate state regulation of production in such field more difficult, if not impossible, even when ratable production is the objective of each state. However, when one state's announced objective is the conservation of an exhaustible natural resource while that of another is speedy depletion thereof, serious consequences arise, as is evident in these appeals. The obvious result, as here, has been the attempted extrapolation of state power to regulate sales and volumes of gas moving in interstate commerce for resale not for the purpose of conservation but to insure to that part of the field in the state what that state believes to be its fair share of the pipeline companies' interstate markets for gas *Cf. Corporation Commission of the State of Oklahoma* v. *Champlin Refining Co.*, 286 U.S. 210, 231, 76 L. Ed. 1062, 1076, 52 Sup. Ct. 539, 563, 86 A.L.R. 403. Therein this Court said:

"The same pipelines and purchasers did not serve or take oil from all the pools, and in some the reasonable market demand was greater in proportion to potential production than in others. Some were prorated longer and had purchasers whose facilities did not extend to others."

As will be hereafter demonstrated, the words "market demands" are key words to be considered by this Court in these appeals in the determination of the validity of the purported ratable take orders issued solely against the purchasers and not against producers, of gas herein. The Supreme Court of Oklahoma, in *Peppers Refining Co.*, v. *Corporation Commission*, 179 P.2d 899, well states the meaning of the words when it said, on page 902 of the opinion:

"It seems clear to us that 'reasonable market demands' as the term is used in these statutory provisions means *the amount of oil the purchasers will buy regardless of how much the industry actually needs and irrespective of the reasonable consumptive demand of this state or of the nation.*" (Emphasis supplied.)

2. The *Permian* case dealt principally with the production of gas and the validity of the Texas Common Purchaser Act and orders of the Railroad Commission of that state supplemental thereto for the purpose of securing ratable production. Here Kansas has no common purchaser act covering natural gas as does Texas. The Kansas Commission, by Commission fiat, which has been approved by the Supreme Court of Kansas in these cases but without legislative approval, has issued its orders directed solely against the purchasers of gas, particularly Northern, as

will be hereinafter pointed out, not for the purpose of prorating production to prevent waste and protect correlative rights, but with the object of forcing Northern to increase its purchases of gas therein so that the Kansas portion of this vast interstate gas field will receive what the Kansas Commission believes to be and wants to be Kansas' fair share of the purchasing pipeline companies' interstate markets for gas. See appellant's Jurisdictional Statement, Appendix B, page XXIII, and Appendix (B) (a), pages XXIV-XXV.

3. In the *Permian* case the Court of Civil Appeals of Texas (page 252 of the opinion) made it plain that it was the intent and purpose of the Commission's order that both the producers of gas in said field and the common purchasers therein are required to conduct their operations in such manner that takes (purchases) from wells in said field will reasonably approximate actual requirements for gas in the field and the allowables assigned each of such wells so that each well will share ratably in the total field outlet. In the purported ratable take orders of the Kansas Commission involved in these appeals, such orders were made to apply only to the purchaser. No restriction was attempted to be enforced against the producer, although both the Kansas Commission and the Supreme Court of that state held that such orders here in question only applied to the production of natural gas. Notwithstanding G.S. 1959 Supp. 55-703 is purely a production statute dealing with the conservation of natural gas and which specifically requires the Kansas Commission, when circumstances in the field require the exercise of its jurisdiction, to *limit* the production of gas to

> ". . . only such portion of all the natural gas that may be currently *produced* without waste and to satisfy the market demands, as will permit each developed lease to ultimately *produce* approximately the amount of gas underlying such developed lease and currently *produce* proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately owned, developed leases or parts thereof." (Emphasis supplied.)

the Kansas Commission, possessed with the knowledge that Northern was obligated to purchase and receive under the Republic "A" contract the legal allowables from the Republic "A" wells (*Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708), saw what it thought was an opportunity to force Northern to purchase for its interstate pipeline system increased sales volumes of gas by requiring it to purchase ratably among all the wells in the field to its system connected but requiring Republic to do nothing. This exposed Northern to heavy penalties under the Kansas statute if it did not comply with such purported ratable take orders. G.S. 1949, 55-708, 709 and 710.

On the other hand if Northern did obey such orders, which it has done, it ran the hazards of threatened suits by Republic against it for money in substantial amounts (running into millions of dollars) for alleged breach of contract, since Northern's interstate markets were not sufficient to enable it to purchase the Kansas Commission fixed allowables from the wells under the Republic "A" contract and also the Kansas Commission fixed allowables

under its other 125 gas purchase contracts in said field. As a matter of fact such threatened litigation by Republic against Northern did materialize as a result of such orders.[2]

While it is Northern's position that in event the challenged regulations should herein be determined to be valid, necessarily the contract obligations would have to yield thereto, the Kansas Commission would appear to have taken a contrary position in its Order dated October 7, 1959 (R. 42,127, 72-[illegible], paragraph 5), and then reversed its position in its Motion to Dismiss at pages 16 and 17 thereof. The attendant severe statutory penalties for failure to comply with such regulations on the one hand, or, on the other, the dire consequences possibly attendant *upon compliance therewith*, as evidenced by Republic's suits,[2] make apparent the substantiality of these appeals.

Had the Kansas Commission been interested in limiting the production of gas in said field as provided by the statute and the subsisting provisions of paragraphs (f) and (g) of the Basic Proration Order for the Hugoton Gas Field (R. Case 42,128 p. 11-12, 18) to protect correlative rights and secure ratable production of gas, it would have ordered Republic in this case to shut in its wells as it was authorized to do in enforcing its Basic Proration Order for that Field, by *G.S. 1949, 55-708, 709 and 710*. As a matter of fact Kansas Commission had in the past exercised such authority and shut in the wells of the producer, Republic, for overproduction in violation of its orders. *Republic*

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[2] *Republic Natural Gas Co. v. Northern Natural Gas Co.*, Nos. W-2557 and W-2258, currently pending in the United States District Court for the District of Kansas to recover damages for alleged breach of contract in amounts aggregating in excess of $25,000,000.00.

Natural Gas Co. v. *State Corporation Commission* (1952), 173 Kan. 172, 175, 244 P.2d 1196.

4. In the *Permian* case, *supra*, the opinion of the Court of Civil Appeals of Texas, at page 242, discloses that the Railroad Commission first concluded on the representation of Phillips Petroleum Company's counsel, among other things, that fictitious nominations and market demand forecasts for gas were causing non-ratable take by the purchaser. It was, however, later ascertained by the commission that such was not the case. Fictitious market demands and allowables to wells therefore were not a factor in the decision of that court. In the *Permian* case, *supra*, there was a pre-existing order of the commission which fixed the field allowable for the Puckett Field at a figure equivalent to the capacity of the cleansing plant through which the gas had to pass before it became merchantable pipeline gas (p. 242). The problem confronting the Commission in *Permian* was that the available market demand was being allocated under contract to all of the wells in the field except one. The ratable take order in *Permian*, *supra*, provided, among other things, for the determination of market demand by means of purchaser nominations and current and retroactive adjustment of each well's allowable based upon percentage factors so that each well would produce its pro-rata share of the actual total production in the field. (*Permian*, *supra*, pp. 244, 245).[3]

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[3] Demonstrating that the Texas Railroad Commission in the *Permian* case, *supra*, UNLIKE THE KANSAS COMMISSION HERE, had as the objective for its order the protection of correlative rights and conservation rather than the enforced speedy depletion of the Puckett-Ellenberger Field, is the subsequent case of *Railroad Commission* v.

In the case at bar a totally different situation is presented. (See appellant's Jurisdictional Statement, page 10, note 16 thereto.) An excellent analysis disclosing complete understanding of the problem faced by Northern in these cases may be found in Mr. Justice Schroeder's dissenting opinion, 188 Kan. 355, 363, 372 P.2d 599, Jurisdictional Statement, Appendix A, page XIII, where it is said:

> "The record discloses that for the entire period from April 1944, through February 1958, there were no important differences between the ratable purchases by Northern from Republic 'A' wells and other wells to which it was connected. The difference in ratio was less than one times the January allowable for essentially the entire period.
>
> "However, in the spring of 1958, a wide difference in Northern's purchases appears between the Republic 'A' wells and the others.
>
> "The reason stated to the Commission and assigned by Northern for this difference is '* * * first, as the Commission is well aware, *allowables granted by the Commission to the field have exceeded the total field production by approximately 130 billion cubic feet*, and the wells connected to Northern, other than the Republic 'A' wells, have been substantially underproduced. Second, is the fact that Northern has been seriously delayed in expanding its system into new markets for gas by reason of the failure of the Federal Power Commission to issue the necessary certificates

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[3] (Continued)

Rudman (Texas Court of Civil Appeals, Feb. 22, 1961, 344 S.W.2d 211), where the court had under question the validity of a similar type order. The court held that nominations for gas made by potential purchasers would be the best forecast of market demand which could be found, and the right of each well to produce is limited to its fair share of the actual production from the field. (*Rudman, supra*, pp. 218, 219.)

of public convenience and necessity. * * *" (Emphasis added by Kansas Court.)

"Testimony on behalf of Northern was that given sufficient time it would be able to conduct its operations in such a way that the taking from the wells to which it was connected would be ratable. *This was based on the assumption that the Commission's future allowable assignments will be realistic*, and on the further assumption that the necessary expansion certificates will be issued to Northern by the Federal Power Commission.

"It must be recognized that Northern's Republic 'A' contract is subject to all valid legislation with respect to gas purchases in the Hugoton Field, either state or federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction. (See Northern Natural Gas Co. v. Republic Natural Gas Co., 172 Kan. 450, 478; 241 P. 2d 708.) The testimony on behalf of Northern was that as far as facilities were concerned, it was not physically impossible for Northern to take gas ratably from the Republic 'A' wells and all other wells connected to its system. The evidence further disclosed that if the markets were sufficient so that Northern could take the current allowables from the Republic 'A' wells and also take the current allowable from all other wells connected to it, then Northern's take would be ratable as between all wells connected to its system. *In other words when the market conditions are at the same level as the allowables then the same rate of take would exist between the Republic 'A' wells and all other wells to which Northern was connected.* (Emphasis added by Court.)

"Theoretically, when these facts are considered in the light of the Basic Proration Order for the Hugoton

Field and the statute pursuant to which it was promulgated, if the Commission is not derelict in its duty *to correlate allowable production with the market demand*, all wells of necessity would be *produced* ratably without supplementation by any order of rule to control the *purchasers* of gas in the Hugoton Field. Taking into consideration the entire history of Northern's purchases of gas in the Hugoton Field starting from April 1944 the above theory seems to have practical application. (Emphasis added by Court.)

"It is readily apparent that any effort to control the purchase of gas, which of necessity on the facts before the Court in the instant case is limited to those wells connected to Northern's gathering system and pipeline, cannot protect the correlative rights of all producers from the common source of supply in accordance with the mandate of the statute. It fails to take into consideration those wells, potentially capable of production, which have no market for their gas, and the differential in markets among the various purchasers of gas from the common source of supply. Therefore, if the Commission fails to exercise its power *to correlate production with demand* it cannot accomplish the mandate of the statute, and resort to a method which requires the *purchasers* of gas in the Hugoton Field to take (purchase) ratably from the wells to which each is connected is little more than a futile gesture." (Emphasis added by Court.) (Insert supplied by appellant.)

It would therefore appear to be clearly manifest that the unratable production existing in the Kansas Hugoton Field was brought about in these cases by (a) Commission's own acts in fixing an unrealistic and arbitrary market demand in the Kansas Hugoton Field creating fictitious well

allowable production therein, and (b) Commission dedicating its policy not to conservation and the protection of correlative rights as authorized by the Kansas Statutes and required by the Basic Proration Order for the Kansas Hugoton Field, but by, extrapolating its authority to the forcing of more gas from the field to be sold in interstate commerce for resale so that the Kansas portion of this interstate gas field would receive what Commission and also apparently the Supreme Court of Kansas believes to be that field's fair share of the interstate markets of the respective pipeline companies purchasing gas therein.[4] Jurisdictional Statement, Appendix E, page XXIII, and Appendix B(a), pages XXIV-XXV.

5. The objectives of the Kansas Commission in these appeals, as analyzed herein and approved by the Supreme Court of Kansas, are not legitimate state objectives. As pointed out to this Court in appellant's Jurisdictional Statement, pages 24-25, this Court made it plain in the recent case of *Gomillion* v. *Lightfoot* (1960), 364 U.S. 339, 347, 5 L. Ed.2d 110, 117, 81 Sup. Ct. 125 that:

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[4] The Kansas Commission has been in recent years committed to a policy of attempting to force [illegible] purchases and volumes of gas from the Ka[illegible] interstate commerce for resale. See paper of [illegible] missioner (now Chairman) Kansas Corporation Commission entitled *Contractual and Property Rights as Affected* [illegible] *and Regulation*, published in 10th Annual [illegible] Law and Taxation by the Southwestern Legal Foundation, Dallas, Texas, 1 page 1 and particularly pages 15 [illegible] page 17 of Northern's Jurisdictional Statement [illegible] of Kansas Commission orders arbitrarily forcing [illegible] granting allowables in excess of the real [illegible] is being contested in numerous earlier cases [illegible] the Supreme Court of Kansas, including those numbered 41515, 41516, 41555 and 41556.

"When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. *But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a state from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition'.*" (Emphasis added.)

The question in these appeals is not as stated by appellee in its argument on page 8 of its Motion to Dismiss, namely "whether the Natural Gas Act deprives the states of their historic authority to protect the correlative rights of owners of natural gas resources by regulation designed to assure ratable production from wells in a common source of supply," but the question is may the State of Kansas, under the guise of regulating production by legerdemain tactics regulate and control the volume of gas sold in interstate commerce for resale for the purpose of securing to the portion of a gas field in that state what its Corporation Commission believes to be the fair share of the pipeline companies' interstate markets.

Two things are really at issue here: Does the State of Kansas have the power to do indirectly what concededly it cannot do directly—to force Northern to purchase more gas from the wells to it connected in the Kansas Hugoton Gas Field; and does the State of Kansas have jurisdiction in the premises to regulate sales and purchases of such gas in interstate commerce for resale after production has ceased. At one of the hearings before the Commission, an expert witness testifying for cities Service Oil Company, which owned wells connected to Northern's lines in the

field, stated that there were two alternative solutions to the unratable situation in the field: "One is to raise the total Northern Natural's takes up until they are ratable with the Republic "A" group, and second would be to lower Republic "A" by curtailing their production so they will become ratable with the balance of the field (R. 687. R 42, 128-68)

It is significant that the regulations complained of were addressed exclusively to purchasers. It is clear, therefore, that the objective of the Kansas Commission in promulgating these regulations was neither conservation nor protection of correlative rights, but rather to force Northern to more speedily deplete the reserves underlying the wells to it connected in the Kansas Hugoton Gas Field.

The foregoing clearly reflects that the *Permian* case, *supra*, is not controlling, the real issue in these appeals must be kept in mind.

The question presented by these appeals does constitute a substantial federal question. It is of the utmost importance to the Federal Power Commission in its administration of the Natural Gas Act to know whether or not it is one of the legitimate rights of a state to control to any extent the volume of gas, after the production thereof has ceased, that is sold in interstate commerce for resale, and if so, to what extent (15 U.S.C.A. 717 et seq.). Likewise, it is essential for the respective gas pipeline companies, purchasing gas from the various common sources of supply located in the several states to satisfy their respective interstate markets, to know whether or not it is one of the legitimate rights of a state to determine to what extent, if any, a state may control the volume of

such gas, particularly when such gas has been dedicated to such interstate markets under written gas purchase contracts which are on file with the Federal Power Commission as rate schedules and on which certificates of public convenience and necessity authorizing such sales have been issued.

The law as laid down by the Supreme Court of Kansas in these cases is such that this Court, in the judgment of appellant, should take jurisdiction in these appeals, overrule appellee's Motion to Dismiss, and determine under the Natural Gas Act, the Constitution of the United States and in the public interest the extent of the power of a state, if any, to regulate in any respect the purchase and sale of gas in interstate commerce for resale.

Respectfully submitted,

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No. 62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

REPLY TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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May 15, 1962

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Natural Gas Act (15 U.S.C. § 717 *et seq.*) ..... 2, *et seq.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 659

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

REPLY TO MEMORANDUM FOR THE FEDERAL POWER COMMISSION

The Memorandum for the Federal Power Commission fails to show that this case raises any substantial Federal question. The principal argument advanced in the memorandum raises what is essentially a question of Kansas law, relies in large measure upon matters that are *dehors* the record, and rests upon a misunderstanding of the nature of the regulatory order of the Kansas Commission that is here involved.

1. The principal argument made in the memorandum is that the order of the Kansas Commission "exerts leverage upon interstate pipelines to purchase natural gas from one State rather than another" and therefore "enters into the field occupied by the Natural Gas Act and is invalid under the Supremacy Clause." (Memorandum, p. 2)

The fact is that the provisions of the Kansas regulation do not exert any kind of leverage upon interstate pipelines to purchase gas in one state rather than in another. The regulation does not require appellant or any pipeline company to take any particular volume of gas, or indeed any gas whatsoever, from any particular seller, or from any field, or from any state. The regulation simply directs appellant and all other takers in the Kansas-Hugoton field to take gas ratably from every well in the field to which each taker is connected. Appellant could fully comply with the terms of the order without increasing its purchases in Kansas, or decreasing its purchases in other states, and without affecting the total volume of gas it moves in interstate commerce.[1]

The Commission's only answer to this indisputable fact is that appellant has entered into private contractual arrangements with a favored supplier in the Kansas-Hugoton field which require it to take a large volume of gas from that supplier, and that since it is thus contractually bound, it will as a result of the regulation "presumably" be forced to increase its purchases

[1] The pertinent part of the ratable take order reads: " • • • each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction • • •." (R. 98, No. 42,127)

from other suppliers in the field. Thus the memorandum asserts (pp. 8-9):

> "The ratable-take order involved in the present case, in effect, established a floor for each purchaser by requiring him to take from all his connected wells at the highest rate at which he was obligated to take from any of them. Under the order, Northern will be required to take the same percentage of the allowable for each connected well that it is required to take from the 'Republic "A"' wells under its contracts with that supplier. Northern will therefore presumably have to increase substantially its rate of take from its other suppliers in Kansas and reduce its take from its suppliers in other states."

Even were the Commission correct as to the effect of appellant's gas purchase contract with its favored supplier, the argument that otherwise valid state regulation cannot be applied to particular persons because of their private contracts with third parties is without merit. A person cannot avoid the order of a regulatory body by contract with third parties. *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349; *St. Louis Poster Adv. Co.* v. *St. Louis*, 249 U.S. 269. The Kansas Supreme Court was plainly correct in this case when it said:

> "We believe that the state may regulate the production of natural gas and the gathering of the same to the extent necessary to insure that the gas under one owner's land will not be drawn off by his neighbor, and that his neighbor cannot plead a contract with a third person to give him a right to drain gas from his neighbor."

The Commission has not argued and could not argue that the regulation here challenged would be invalid as applied to a purchaser who had not, as appellant has here, entered into private contractual arrangements with third parties. If the regulation would be valid in such circumstances it can hardly be less valid here.

In any event the force of the Commission's argument depends entirely on the assumption that the provisions of the contract between appellant and Republic are inviolable and cannot be affected by the state order. If this assumption is unsound then the Federal question that the Commission seeks to assert disappears, because appellant admittedly could comply with the Kansas order without affecting its total field purchases, by decreasing its take from the Republic "A" wells.

We submit that the Federal Power Commission's basic assumption is unsound. Under Kansas law, which is necessarily controlling, any prior contractual obligation between appellant and Republic is *pro tanto* modified by the Kansas regulation, and accordingly appellant is free to comply with the regulation by decreasing its take from Republic without violating the contract or incurring any liability thereunder.[2]

The Supreme Court of Kansas specifically noted that the contract between appellant and Republic is explicitly made subject to "all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction" (R. 158, No. 42,127). It was on this basis that the Supreme Court of Kansas held that the Kansas order raised no constitutional question with respect to the impairment of the con-

[2] See Northern Natural Gas Company v. Republic Natural Gas Company, 172 Kan. 450, 241 P. 2d 708.

tract (R. 158-159, No. 42,128). And indeed it is significant that appellant itself asserts that " * * * in event the challenged regulations should herein be determined to be valid, necessarily the contract obligations would have to yield thereto * * * ". (Appellant's Brief in Opposition to Motion to Dismiss, p. 10).

Even if this question of Kansas law could be said to be open or doubtful, there would still be no substantial Federal question now ripe for decision. On that assumption the antecedent question of state law upon which the asserted Federal question would depend would not have been authoritatively decided by the state court. In those circumstances the case should be remanded to the Supreme Court of Kansas for a definitive decision on the question of contract interpretation since the resolution of that question might well moot the Federal question which the Commission asserts is raised in this case. Compare *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 228-229.

2. In an attempt to support its contention that the order is not designed to protect correlative rights, the Commission attacks the order on the ground that it is not applicable as between different pipeline purchasers and accordingly does not provide for complete and absolute proportionate removal of gas from wells in the Kansas-Hugoton field. (Memorandum, pp. 2-3)

But the Commission cannot raise a Federal question by attacking the Kansas order on the ground that it does not go far enough in dealing with the problem of correlative rights or that it fails to meet some absolute standard of effectiveness. The Commission's reliance on this irrelevant criticism is simply one facet of its attack upon the motive of Kansas in promulgating the

ratable taking order.[3] This attack upon motive is likewise irrelevant. Unless it is to be asserted that Kansas has no power in any circumstances to order ratable taking to protect correlative rights—a proposition that the Commission does not embrace—then the order admittedly operates upon subject matter that is within the regulatory power of the state. It is well settled that if a state regulatory agency exercises power that is otherwise within its competence the exercise cannot be attacked on grounds of motive or on the ground that it was in part designed to further purposes which, considered alone, the state has no constitutional power to effect. *Stephenson* v. *Binford*, 287 U.S. 251, 276; *Amy* v. *Watertown*, 130 U.S. 301, 319; *Soon Hing* v. *Crowley*, 113 U.S. 703.

The fact is, however, that if the Kansas order is considered in the context of the entire regulatory plan of which it is a part, and in terms of the particular situa-

[3] The Commission also attacks the motives of Kansas in determining market demand for the purposes of the Basic Proration Order. (Memorandum, pp. 4-9) This passage of the Commission's argument relies upon alleged facts, conclusions and state orders that are not found in the record certified to this Court by the Clerk of the Kansas Supreme Court. Such matters were not before the courts below but instead are involved in another set of cases now pending before the Kansas Supreme Court. Southwestern Kansas Royalty Owners Association v. State Corporation Commission, et al., Case No. 42038; Colorado Interstate Gas Co. v. State Corporation Commission, Case No. 42185; Northern Natural Gas Co., et al. v. State Corporation Commission, Case Nos. 42175, 42176, 42230. The primary issue in these latter cases, often referred to as the "market demand cases," is whether the Kansas Commission has the power to set the volumetric market demand for gas at levels higher than the actual pipeline withdrawals. The sole question in the instant case is whether the Natural Gas Act deprives the states of authority to protect correlative rights of owners of natural gas resources within their boundaries.

tion to which it was directed, it affirmatively appears that the Commission's criticisms are without substance. The ratable taking order must be considered in relation to the Basic Proration Order issued for the Kansas-Hugoton field in 1944.[4] The primary purpose of the Basic Proration Order was to assure, within reasonable production limits, the ratable production of gas from all wells in the field. To effect this purpose the State Commission determined for each well an allowable based on geological and engineering data, and reflecting the comparative deliverability of each well with all other wells in the field.[5] Appellant defeated the purpose of the Basic Proration Order—the prevention of drainage and protection of correlative rights—by a gross failure to take ratably from its various connections. (The grossness of this failure is indicated in the Motion to Dismiss (see p. 6, n. 3)). Kansas was entitled to exercise its power to deal with this particular situation, and the fact that it did so without attempting to deal with less serious cases of injury to correlative rights does not invalidate the exercise of power or raise any Federal question. As this Court said in *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489:

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. * * * Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most

[4] The Basic Proration Order for the Hugoton Gas Field may be found on pages 7-29 of the Record in Case No. 42,127 and pages 6-28 of the Record in Case No. 42,128.

[5] "Deliverability" is a measure of and reflects the reserves underlying each well.

> acute to the legislative mind. * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others. * * * [Citations omitted]

3. We have shown above that there is no merit in the Federal Power Commission's assertion that the Kansas regulation exerts a "leverage" upon interstate pipelines to purchase gas from one state rather than another.[6] But even if it is assumed *arguendo* that the regulation has this consequence, the regulation is still valid and the attack upon it raises no substantial Federal question.

The Commission's memorandum assumes that if an exercise of state regulatory power exerts "leverage" upon interstate pipelines to purchase natural gas from one state rather than another, the regulation enters into a field occupied by the Natural Gas Act and is invalid under the Supremacy Clause.

This argument misconceives and misapplies the criteria laid down by this Court for determining the validity of state action under the Natural Gas Act. Whether an exercise of state power invades the field occupied by the Natural Gas Act depends upon whether the power is one that the state could have constitutionally exercised prior to the passage of the Natural Gas Act. (See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684, 685-687, and the other authorities cited

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[6] As a consequence another of the arguments of the Commission is without merit. The Commission contends that the leverage exerted upon interstate pipelines will result in increased fuel costs to the ultimate consumer. Of course, if as indicated in the text, no such leverage is exerted by the Kansas order, no increased cost to the consumer can result.

at page 11 of the Motion to Dismiss.) The power exercised here by Kansas satisfies this test, because the power to require ratable taking is a state power that this Court had upheld prior to the passage of the Natural Gas Act. (See the authorities cited at page 12 of the Motion to Dismiss.)

It is significant that the Commission cites no provisions of the Natural Gas Act and no decisions of this Court in support of the proposition that if state action causes interstate pipelines to purchase natural gas from one state rather than another, the action conflicts with the regulatory authority of the Commission. In fact the Commission has no authority under the Natural Gas Act to apportion purchases of natural gas among states or to take any other action designed to control or influence the purchase of natural gas in one state rather than another. There is therefore no basis on which it can be argued that the action of the Kansas Commission has interfered with or is in conflict with any regulatory authority conferred upon the Federal Power Commission by the Natural Gas Act even if the action is assumed *arguendo* to exert "leverage" upon an interstate pipeline company. This Court has refused to strike down state regulatory action taken within the area reserved to the states under the Natural Gas Act in the absence of a clear showing that the exercise of the power is inconsistent with Federal authority. Compare *Panhandle Eastern Pipeline Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 334; *Panhandle Eastern Pipeline Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 519-520, with *Cities Service Co.* v. *State Commission of Kansas*, 355 U.S. 391. No such showing is possible here because the Federal Power Commis-

sion has no authority to protect correlative rights by ordering ratable taking and no authority to adjust, to allocate or to distribute among the several producing states the volume of gas produced in those states for movement in interstate commerce.

4. The Commission attempts to avoid the legal significance of this Court's dismissal of the appeal in *Permian Basin Pipeline Company* v. *Railroad Commission of Texas*, 358 U.S. 37, by seeking to distinguish the facts and issues presented here from those involved in that case. The Memorandum urges that the *Permian* case is not apposite here because in that case (1) the total amount of gas flowing in interstate commerce was "not in issue", (2) the action taken by the Texas Railroad Commission could not have a direct impact upon the cost of gas to the pipeline company, and (3) the gas field was located within a single county in Texas.[1]

The first two suggested distinctions are wholly without merit because the Kansas ratable taking order does not affect "the total amount of gas flowing into interstate commerce" nor does it have any "impact upon the cost of gas to the pipeline company." As we have shown above, the Commission's argument to the contrary rests entirely upon its erroneous view of a question of Kansas law, *i.e.*, the effect of the Kansas order

[1] The memorandum also attempts to state a difference by alluding to the fact that in the Permian case, the gas was sold to a processing plant before being transported into interstate commerce. However, the Court found that the processing plant was merely part and parcel of the pipeline's gathering and transporting system, and it was to the pipeline company that the ratable take order was issued. The fact that a plant was interwoven into the transportation system is not a difference between that case and the instant one which has any legal significance.

on the contract between appellant and its favored supplier. Furthermore, as was noted in the Motion to Dismiss (p. 9), the appellant in the *Permian* case claimed, as the Commission here claims, that the pipeline company's contractual undertakings were such that the effect of the state order would necessarily be to require the pipeline either to purchase more gas for introduction into interstate commerce from the particular field or to pay damages for breach of contract. It is apparent that this Court did not regard this argument as raising a substantial Federal question.

The fact that the *Permian* case involved a gas field in one state, and that this case involves a gas field extending through three states, has no legal significance. In both cases, although the ratable taking orders were confined in their application to activities within the borders of a single state, they were directed to interstate pipeline companies which were engaged in moving gas in interstate commerce. In these circumstances the question whether the particular gas reserves were confined to one county or extended under the surface through more than one state cannot affect the validity of the orders under the Natural Gas Act.

CONCLUSION

For the foregoing reasons the appeal should be dismissed for lack of a substantial Federal question. In the alternative, if the Court should be of the view that this case may present a Federal question depending upon the resolution of an antecedent question of Kansas contract law, and should believe that that question has not already been resolved by the Kansas courts,

the case should be remanded to the Supreme Court of Kansas for resolution of that antecedent question.

Respectfully submitted,

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May 15, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. 62

NORTHERN NATURAL GAS COMPANY,
Appellant,

v.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

APPELLANT'S BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 62

NORTHERN NATURAL GAS COMPANY,
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vs.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLANT'S BRIEF

OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas, whose judgments of affirmance are under review in these appeals, are officially reported as to No. 42,128 in 188 Kan. 355, 362 P.2d 599 (R. 157, and also attached hereto as Appendix A), and as to No. 42,127 in 188 Kan. 351, 362 P.2d 609 (R. 36, and also attached hereto as Appendix D). Such Court's opinion denying rehearing in No. 42,128 is of-

ficially reported in 188 Kan. 624, 364 P.2d 668 (R. 187, and also attached hereto as Appendix B; the News Week article therein referred to being attached hereto as Appendix C). No opinion was rendered by that Court in denying rehearing in No. 42,127 (R. 44).

The state district court from which appeals in these cases were taken by appellant to the Supreme Court of Kansas did not render an opinion in either case. The judgment of affirmance of such district court in No. 42,128 can be found at R. 112. Similarly such district court's judgment of affirmance in No. 42,127 can be found at R. 26. The judgments sustained as valid certain Orders and a Rule of the State Corporation Commission of Kansas regulating the taking (purchasing) of natural gas in the "Kansas Hugoton Field", the operational effect of which was to control the sale therefrom of gas sold in interstate commerce for resale.

The Order of the State Corporation Commission that is the subject matter of the trial court's judgment of affirmance in No. 42,128 (R. 99), is not supported by Commission opinion, but the same, including the findings of such Commission, is attached hereto as Appendix E. The Order and Rule issued by the State Corporation Commission that is the subject matter of the trial court's judgment of affirmance in No. 42,127 (R. 14), is also not supported by Commission opinion, but similarly the same, including the findings of such Commission, is attached hereto as Appendix F.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas in No. 42,128 was entered by that Court June 10, 1961 (R. 157). On August 31, 1961, appellant's motion for

rehearing therein (R. 175) was denied by official opinion and such judgment thereupon became final (R. 187). The judgment of the Supreme Court of the State of Kansas in No. 42,127 was entered by that Court June 10, 1961 (R. 36), and relies therein on that Court's opinion in No. 42,128 for a development of the facts and reasoning of its decision. On September 19, 1961, appellant's motion for rehearing therein (R. 42) was denied without opinion, and such judgment thereupon became final (R. 44). Within the time prescribed by 63 Stat. 104, 28 U.S.C.A. 2101 (c), appellant, on November 17, 1961, duly filed in No. 42,128 and No. 42,127, with the Clerk of the Supreme Court of Kansas, its notice of appeal to this Court with proper proof of service thereof (R. 44, 189). (Rules 10 and 11 of this Court.)

The jurisdiction of this Court to review each of such final judgments and decisions of the Supreme Court of Kansas by direct appeal is authorized by 62 Stat. 929, 28 U.S.C.A. 1257(2), and is supported by the decisions of this Court, including, among others:

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794.

Natural Gas Pipe Line Co. v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576.

Cities Service Gas Co. v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381.

On May 28, 1962, this Court entered its order noting probable jurisdiction in each of these cases which have been docketed herein as one appeal. ..... U.S. ....., 8 L. Ed. 2d 399, 82 S. Ct. 1248.

QUESTION PRESENTED

Does the State of Kansas have jurisdiction, under the guise of regulating production and in the face of the provisions of the Natural Gas Act and Federal Power Commission regulations thereunder, to control the sale of natural gas in interstate commerce for resale after the production and gathering thereof has ended, by directing a natural gas company purchaser, operating under subsisting gas sales contracts with its producers, to make its purchases in a manner or at a rate contrary to such contracts which are on file with the Federal Power Commission as effective rate schedules and on which certificates of public convenience and necessity authorizing such sales have been issued?

STATUTES INVOLVED

In No. 42,128 in the Supreme Court of the State of Kansas the order of the Corporation Commission of that State under review by that Court was dated October 7, 1959, and in material substance provided:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field." (R. 101).

The contents of said Order are set forth in full in Appendix E hereto.

In No. 42,127 in the Supreme Court of the State of Kansas the Order and Rule of the Corporation Commission of that State under review by that Court was issued effective February 8, 1960, and in material substance provided:

"Rule 82-2-219

"Ratable Production of Gas from Common Source of Supply

"In each common source of supply under proration by this Commission, *each purchaser shall take gas* in proportion to the allowables *from all the wells to which it is connected* and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S., 1959 Supp., 55-703; Effective February 8, 1960)." (Emphasis added.) (R. 17-18).

The contents of said Order and Rule are set forth in full in Appendix F hereto.

In Kansas such orders and rules have the force and effect of a state statute. *Stratton* v. *Atchison, T. & S. F. Rly. Co.*, 118 Kan. 673, 236 Pac. 831; *White Eagle Oil Co.* v. *State Corporation Comm.*, 168 Kan. 548, 549, 214 P.2d 337.

The Kansas statute, G.S., 1959 Supp., 55-703, that was in effect at the time such Orders and Rule were issued and upon which the same are based provides:

"Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce

natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: *Provided, however*, That the daily takes of gas from any well in an unprorated gas pool shall not exceed twenty-five percent (25%) of its open flow: *Provided further, however*, That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells thereir is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand (G.S. 1949, § 55-703; L. 1959, ch. 237, § 1; June 30)."

Federal statutory provisions and regulations together with the United States Constitutional provision upon which appellant relies for a reversal of the judgments on appeal herein are:

The provisions of the Natural Gas Act, 52 Stat. 821 through 833, as amended [15 U.S.C.A. 717 and 717a through 717w, as amended], particularly: Sections 1, 4, 5, 7, 16 attached hereto as Appendix G. The following Federal Power Commission rules and regulations, 18 C.F.R., Sec. 154.91 (a) (1) and (b), and 154.92 (a) and (b), 154.93, 154.94 (a), 154.97; 18 C.F.R. 157.5 (a), (b), (c), 157.23 (b) and 157.30 attached hereto as Appendix H.

Clause 2 of Article VI of the United States Constitution, which reads:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT

Appellant, Northern Natural Gas Company, hereinafter for convenience called Northern, is a corporation engaged in the business of purchasing natural gas for transportation and sale in interstate commerce for resale for ultimate public consumption and is, therefore, a "natural-gas company" as defined in the Natural Gas Act, 52 Stat. 821, 15 U.S.C.A. 717a (R. 18, 19).

The "Hugoton Gas Field" encompasses and constitutes a single interstate common source of supply of natural gas

and lies, in its entirety, within the States of Kansas, Oklahoma and Texas. It is said to be one of the largest reservoirs of natural gas in the world. The largest portion of the field is located in Kansas. This portion of such common source of supply is commonly known as the "Kansas Hugoton Field". That portion in Oklahoma is called the "Guymon Hugoton Field", and that part of the field in Texas is designated as the "Texas Hugoton Field". *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 724, 222 P.2d 704; *Interstate Oil Compact Quarterly Bulletin*, Volume XI, December, 1952, Nos. 3 and 4, page 12; and *Conservation of Oil and Gas*, 1948, by Mineral Law Section of the American Bar Association, 165-183, 403-408.

While the "Hugoton Gas Field" comprises but one single common source of supply of natural gas, the production of natural gas in the portion of the field lying in Texas is regulated by the Railroad Commission of that State. Article 6008, *Vernon's Annotated Texas Civil Statutes*, 10 through 22; and Articles 6008a-2, 6049c-7 and 6049d-4. Production in that part of the field within the State of Oklahoma is regulated by the Corporation Commission of that State. *52 O.S.A.*, Sections 21 through 35, 231 through 233, and 236 through 247. The largest portion of the field is in Kansas and the production therefrom is regulated by the Corporation Commission of the State of Kansas, under the provisions of G.S. 1949, 55-701 through 55-713, and G.S., 1961 Supp., 55-703, 55-706, and 55-711, being amendments thereto in effect at all times material herein Under the rule laid down by this Court in *United States* v. *Louisiana*, 363 U.S. 1, 33, 4 L. Ed. 2d 1025, 80 S. Ct. 961, the jurisdiction of such respective States of the "Hugoton Field" is limited to that portion of the field which is located within boundaries of each State.

Northern, as a "natural-gas company" purchases gas to supply its interstate markets from various common sources of supply both within and outside of Kansas. *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708; *J. M. Huber Corporation* v. *Federal Power Commission* (C.A. 3), 236 F.2d 550, 552-553. The "Kansas Hugoton Field" has been one of Northern's most important sources of gas supply from the formation of the company to the present time (R. 69). The initial contract for Northern's gas supply in such field was dated May 27, 1930, and executed by predecessors in interest of Northern and Republic Natural Gas Company, for convenience referred to hereafter as Republic. On December 21, 1945, Northern and Republic entered into a new contract hereinafter referred to as the Republic "A" Contract (or as Republic's F.P.C. filed Rate Schedule) which contract superseded the original contract and previous amendments thereto. This contract, as subsequently amended, covers the sale of gas by Republic to Northern from approximately 144 gas wells in the "Kansas Hugoton Field" (R. 69-70).

Under the Republic "A" Contract, as amended, as under the initial 1930 contract, certain maximum and minimum quantities of gas were specified for sale and purchase between the parties (R. 70-73). The Kansas Supreme Court, in the case of *Northern Natural Gas Company* v. *Republic Natural Gas Company*, 172 Kan. 450, 241 P.2d 708, issued March 8, 1952 (decided more than two years prior to issuance of the Federal Power Commission series of orders 174, regulating producers of gas and requiring certification of sales and service to be rendered pursuant to such Republic "A" Contract), determined that Northern should regulate its purchases from the Republic "A" wells so that at the end of each contract accounting year it would

have purchased therefrom the volume of gas Republic is entitled to produce and deliver to Northern under valid subsisting orders of the Corporation Commission of Kansas for that particular year. Such volumes will hereafter be referred to as the "legal allowables" of the Republic "A" wells. Since said court decision Northern has endeavored to purchase from the Republic "A" wells during each such contract year the volumes of gas they were legally entitled to produce (R. 74-75).

Beginning in 1938 Northern contracted to buy additional gas supply in the "Kansas Hugoton Field" from various other producers. It currently has in effect about 125 gas purchase contracts with producers in said field under which approximately 1,100 wells have been connected to Northern's pipeline therein (R. 75-76). All of such contracts were required to be filed as rate schedules with the Federal Power Commission (18 C.F.R. 154.91 (a) (1) and 154.92 (a)) and provide that Northern shall purchase gas ratably from the wells covered thereby with all other wells in said field except the Republic "A" wells. Such contracts specifically exempt the volume of gas Northern is obligated to purchase from the Republic "A" wells in determining Northern's contract duty to purchase ratably from the wells in the field connected to it (R. 76-78).

From March, 1944, the date of the promulgation of the Basic Proration Order for the "Kansas Hugoton Field" (R. 47-66), until 1958, there was no important difference between Northern's purchases from the Republic "A" wells and other wells connected to its system in that field. Its purchases from all wells to which it was connected in the field were substantially ratable over reasonable periods of time (R. 78-84). In the spring of 1958, however, a material difference developed with respect to such ratability. Such difference resulted from two factors. First, the Corporation

Commission of Kansas, hereinafter for convenience called Kansas Commission, by its market demand orders, had, since 1956, granted allowables to the wells in the "Kansas Hugoton Field" of approximately 130 billion cubic feet in excess of the total field production therein (R. 84). Secondly, Northern had been seriously delayed in expanding its system to new markets by the failure to timely receive the necessary certificates of public convenience and necessity from the Federal Power Commission (R. 85). Since Northern was obligated to and did purchase the "legal allowables" from the Republic "A" wells, the action of the Kansas Commission in fixing the high allowables, plus the inability of Northern to connect anticipated new markets, resulted in substantial underproduction accruing to wells other than the Republic "A" wells connected to Northern's interstate pipe line system in the "Kansas Hugoton Field" (R. 85, 87).

On May 27, 1959, the Kansas Commission issued an order requiring Northern to show cause why it should not "take" (purchase) gas ratably from all wells to which it was connected in the "Kansas Hugoton Field" (R. 66). After conclusion of the hearing on said show cause order, the Kansas Commission issued its Order dated October 7, 1959, the subject matter of review in case No. 42,128 in the Supreme Court of Kansas, whereby Northern was directed and required to purchase gas ratably from all of such wells connected to its interstate system in said field (R. 99, App. E). While this Order was subsequently rescinded by the Kansas Commission on February 8, 1960 (R. 110, 111), it was affirmed as valid by the Supreme Court of Kansas (R. 157).

On November 12, 1959, the Kansas Commission initiated proceedings for the adoption of a rule to require all purchasing companies to purchase gas ratably from all wells to which they are connected in each common source of

supply including the "Kansas Hugoton Field"; in the State of Kansas (R. 2). There are interstate pipe line purchasers other than Northern in said field. Cf. *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 222 P.2d 704; *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P.2d 528, reversed 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381. The record before the Kansas Commission that appears in case No. 42,128 in the Supreme Court of Kansas was incorporated into this proceeding, the review of which was designated Case No. 42,127 in the Supreme Court of Kansas (R. 4, 5). After further hearings the Kansas Commission on February 3, 1960, issued its Order promulgating Rule 82-2-219 requiring each purchaser in any common source of supply under proration to "take" (*i. e.*, purchase) gas from all wells to which it is connected in proportion to the allowables thereof and to maintain all such wells in substantially the same proportionate status as to overproduction and underproduction (R. 17, App. F).

Within the time authorized by statute, appellant duly filed petitions with the Corporation Commission for a rehearing of each of said Orders and Rule (R. 18, 101). In each of such petitions for rehearing (R. 20, 21, 103, 102) appellant raised, among others, the same federal question here asserted. On February 18, 1960, and November 10, 1959, the Kansas Commission denied appellant's petitions for rehearing (R. 21; 105).

Within the time prescribed by said Kansas statutes, appellant instituted its respective judicial review actions in the District Court of Finney County, Kansas, raising, among other questions, the same federal question here asserted (R. 24; 107). The cases were heard by the Finney County District Court which entered its respective judg-

ments affirming the validity of each of said Orders and Rule (R. 26; 112).

Thereafter appellant appealed each of said Finney County District Court's judgments to the Supreme Court of Kansas. In due course that Court affirmed each such judgment, and the decision of the Supreme Court of Kansas in each of such cases is now before this Court for review based on the same federal question hereinbefore set forth. That question the Supreme Court of Kansas has decided adversely to appellant.

SUMMARY OF ARGUMENT

Northern Natural Gas Company is an interstate pipeline company engaged in the purchase of natural gas for transportation and resale in interstate commerce, and accordingly is a "natural-gas company" subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. Northern, as a "natural-gas company" purchases gas to supply its interstate markets from various common sources of supply both within and outside of Kansas. The Kansas portion of the Hugoton Gas Field (which field in important parts lies also in the States of Oklahoma and Texas) is a source of gas supply for several interstate gas pipeline companies including Northern. Northern has approximately 125 gas sales contracts with independent producers covering purchases of gas by it in the Kansas portion of the Hugoton Gas Field. Each of such gas sales contracts has been filed with and accepted by the Federal Power Commission as an independent producer rate schedule and a certificate of public convenience and necessity has been granted with respect thereto. One of such contracts, with Republic Natural Gas Company (Republic's F.P.C. Rate Schedule), contains a minimum purchase provision while

all of the other gas sales contracts were, with respect to ratable purchases by Northern, made subject to such minimum purchase provision.

In October, 1959, the State Corporation Commission of the State of Kansas entered an Order addressed to Northern as a purchaser, requiring it to purchase gas ratably from the wells of all producers connected to Northern's lines in the Kansas Hugoton Gas Field. In February, 1960, such Kansas Commission rescinded its October, 1959, Order, and by Order issued a Rule requiring all of the purchasing pipeline companies to "take" (purchase) gas ratably from all wells connected to their respective pipe line systems in each common source of supply. Neither of such Orders nor the Rule were in any manner directed to producers or to the business of production but were rather addressed solely to the purchasers of such gas; this, notwithstanding the fact that such sales by such producers to Northern, being in interstate commerce for resale, were subject to the exclusive jurisdiction of the Federal Power Commission.

Northern's market demands (requirements) for gas from the Kansas Hugoton Field were not sufficient to permit it to purchase the minimum volumes of gas required under the Republic Rate Schedule and at the same time purchase ratably from the wells under all of the other producers' rate schedules covering sales of gas in such field to it. It therefore was required to choose between (a) obeying the Kansas Commission's Orders and Rule and thereby subjecting itself to potential liability under the Republic Rate Schedule or (b) not obeying the Orders and Rule and thereby subjecting itself to statutory penalties provided under Kansas law. Northern chose the former course pending determination of the validity of said Orders and Rule.

The issue herein is whether, in view of the provisions of the Natural Gas Act, the Orders and Rule complained of are within the regulatory authority of the Federal Power Commission under its mandate to regulate the "transportation or sale" of natural gas in interstate commerce for resale, or within the power of the State to regulate under the "production or gathering" exemption of said Act.

In 1938 the Congress enacted the Natural Gas Act (15 U.S.C.A. 717 *et seq.*), thereby evidencing an intent to create a "comprehensive and effective regulatory scheme" with regard to the business of transporting and selling for resale natural gas for ultimate distribution to the public in interstate commerce. *Panhandle E. Pipe Line Co. v. Public Serv. Com.*, 332 U.S. 507, 520, 92 L. Ed. 128, 68 S. Ct. 190, 197. Congress having entered such field, the Supremacy Clause of the Federal Constitution controls. *Free v. Bland*, U.S. , 8 L. Ed. 2d 180, 183, 82 S. Ct. 1092, 1093. In 1954 this Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682, 684, 98 L. Ed. 1035, 74 S. Ct. 794, 799, 800, determined that it was within the Federal Power Commission's authority and duty to regulate sales of natural gas in interstate commerce for resale under the Natural Gas Act "at both ends of the interstate transmission systems."

In outlining the jurisdiction of the Federal Power Commission in the performance of its obligation to determine what certificates authorizing sales and service should be granted to natural-gas companies (both independent producers and interstate pipe line companies) this Court in *Atlantic Ref. Co. v. Pub. Ser. Com. of New York*, 360 U.S. 378, 3 L. Ed. 2d 1312, 1320, 79 S. Ct. 1246, amendment denied 361 U.S. 801, 4 L. Ed. 2d 53, 80 S. Ct. 42, held that rates (prices) are not the only factor bearing on the public convenience and necessity; in *Sunray Mid-Continent Oil*

Co. v. *F.P.C.*, 364 U.S. 137, 4 L. Ed. 2d 1623, 80 S. Ct. 1392, rehearing denied 364 U.S. 856, 5 L. Ed. 2d 80, 81 S. Ct. 32, as well as in *Sun Oil Company* v. *Federal Power Commission*, 364 U.S. 170, 4 L. Ed. 2d 1639, 80 S. Ct. 1388, rehearing denied 364 U.S. 856, 5 L. Ed. 2d 80, 81 S. Ct. 32, held that, irrespective of private contract provisions limiting the duration of the sales and service of gas sold in interstate commerce for resale covered by such contract, the Federal Power Commission alone has the jurisdiction to determine when and if it is in the public interest to abandon service; in *F.P.C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 5 L. Ed. 2d 377, 81 S. Ct. 435, held that the Federal Power Commission must evaluate *all* features bearing on public interest in determining whether to grant natural gas certificates of public convenience and necessity.

The Kansas Orders and Rule herein are invalid since they attempt to regulate the sale of gas in interstate commerce for resale in violation of the Natural Gas Act. They do not regulate the production of gas since production has ended at the point the purchaser takes (*i. e.*, purchases) gas from the producer. Production is "the act of bringing forth gas from the earth." *Saturn Oil & Gas Company* v. *Federal Power Com'n.*, (C.A. 10) 250 F.2d 61, cert. den. 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542. Northern is not a producer of gas in Kansas (R. 19). Under Republic's Rate Schedule gas is purchased by Northern at the point of delivery which is designated as the point at which Northern's pipelines connect to Republic's facilities at the wellhead (R. 143-144). At such point production has been completed and the sale of the gas is subject to the exclusive regulation of the Federal Power Commission. *Continental Oil Company* v. *Federal Power Commission*, (C.A. 5) 266 F.2d 208.

No State can, under the guise of a purported ratable take order or rule, compel a natural gas pipe line company which is subject to the jurisdiction of the Federal Power Commission to purchase gas within such State in volumes contrary to the requirements of its gas purchase contracts which have been filed as rate schedules with and certificated for sales and service by the Federal Power Commission. Natural Gas Act, Sections 4 and 7. This is a matter of national, rather than local concern since the subject sales are interstate in nature. Accordingly, only the Federal Power Commission has jurisdiction to determine what is in the public interest.

On the facts here involved and the effect of the Orders and Rule of the Kansas Commission, the decisions of the Supreme Court of Kansas upholding the validity of the Kansas Commission's Orders and Rule should be reversed, just as this court, in 1958, reversed the judgment of the Kansas Supreme Court in the minimum price case. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381.

ARGUMENT

I

The Natural Gas Act Grants to the Federal Power Commission Exclusive Jurisdiction to Regulate All Aspects of the Sale of Natural Gas in Interstate Commerce for Resale.

The necessity for federal regulation under the Natural Gas Act was made perfectly plain by the Congress of the United States when at the outset of the Act it specifically declared:

> "* * * that the business of transporting and selling natural gas for ultimate distribution to the

public is affected with a public interest, *and that federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate * * * commerce is necessary in the public interest.*" (Emphasis added). 52 Stat. 821, 15 U.S.C.A. 717 (a).

No less plain and understandable is the language of Section 1 (b) of said Act:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, * * *." 52 Stat. 821, 15 U.S.C.A. 717 (b).

Congress in enacting the provisions of the Natural Gas Act evidenced an intent "to create a comprehensive and effective regulatory scheme". *Panhandle E. Pipe Line Co. v. Public Serv. Com.*, 332 U.S. 507, 520, 92 L. Ed. 128, 68 S. Ct. 190, 197. Whatever may be the announced intention in the promulgation of the Kansas Orders and Rule complained of, if they conflict with the federal law they must yield thereto. This Court on May 21, 1962, in *Free v. Bland*, ... U.S. ....., 8 L. Ed. 2d 180, 183, 82 S. Ct. 1092, 1093, said:

> "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article 6, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield. Gibbons v. Ogden (U.S.) 9 Wheat 1, 210, 211, 6 L. Ed. 23, 73. See Franklin Nat. Bank v. New York, 347 U.S. 373, 98 L. Ed. 767, 74 S. Ct. 550; Wissner v. Wissner, 338 U.S. 655, 94 L. Ed.

424, 70 S. Ct. 398; Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 87 L. Ed. 165, 63 S. Ct. 172. Thus our inquiry is directed toward whether there is a valid federal law, and if so, whether there is a conflict with state law."

To that end Congress specifically charged the Federal Power Commission with the responsibility of regulating under the Natural Gas Act and especially Sections 1, 4, 5, 7 and 16 as pertinent herein, the transportation and sale in interstate commerce of natural gas for resale for ultimate public consumption, and natural gas companies engaged in such transportation or sale while, at the same time, leaving to the states certain areas of responsibility, such as the drilling and spacing of wells and the like.[1]

One of the questions presented by these appeals is whether the State of Kansas has jurisdiction, in the face of the provisions of the Natural Gas Act and the Federal Power Commission regulations thereunder, to require a "natural-gas company" purchaser to increase its purchases of gas within Kansas for transportation and resale in interstate commerce by directing such company to make its purchases in a manner or at a rate contrary to the Federal Power Commission's Gas Rate Schedules covering sales of gas to it. Producers' gas sales contracts, under applicable

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1. *Colorado Interstate Gas Co. v. Federal P. Com.*, 324 U.S. 581, 602-603, 89 L. Ed. 1206, 65 S. Ct. 829. Similarly, a state may determine common sources of supply of oil and gas, require production separately from separate producing formations found within the common well bore, and restrict the commingling of production therefrom; restrict the production from developed leases for purposes of conservation and protection of correlative rights, provide means for proper measurement of production, require well completion in such a manner as to protect fresh water strata and prevent the introduction of salt water into producing formations, control secondary methods of recovery, waterflooding, etc.

rules and regulations of the Federal Power Commission, are filed as gas rate schedules. See *Sun Oil Company* v. *Federal Power Commission*, 364 U.S. 170, 4 L. Ed. 2d 1639, 80 S. Ct. 1388, rehearing denied 364 U.S. 856, 5 L. Ed. 2d 80, 81 S. Ct. 32.

To *assure* adequate service to ultimate consumers in the interstate markets of the respective gas pipe line companies, the Federal Power Commission has jurisdiction to regulate sales, supply and service at the end of interstate transmission. *Michigan Consolidated Gas Co.* v. *Federal Power Com'n*, (App. D.C.) 283 F.2d 204, cert. denied 364 U.S. 913, 5 L. Ed. 2d 227, 81 S. Ct. 276. As this Court has said, to be effective such jurisdiction must apply to sales, supply and service at the *source* of such gas sales. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794.

Of course it is clear from the very face of both the Orders and the Rule issued by the Kansas Commission in these appeals that they constitute a regulation of such sales. The October 7, 1959 Order ordered Northern to "take gas ratably from all wells"; the Rule effective February 8, 1960, ordered each purchaser (to) "take gas in proportion to the allowables from all the wells to which it is connected." Both the Kansas Commission and the Kansas Supreme Court (R. 163) defined "purchaser" as "taker". But, it is manifest that the very idea of "purchase" imports a "sale". A purchase occurs whenever a sale is effected. *Nicol* v. *Ames*, 173 U.S. 509, 532, 43 L. Ed. 786, 19 S. Ct. 522, 528. Accordingly it is clear that the Orders and Rule complained of here are, in fact and in law, regulations of sales.

From 1954 to date, the decisions of this Court and all other federal courts have clearly indicated that the area of activity attempted to be regulated by the State of

Kansas herein is subject to the exclusive jurisdiction of the Federal Power Commission and that the State is powerless to enforce its edicts with respect thereto. On June 7, 1954, this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682-684, 98 L. Ed. 1035, 74 S. Ct. 794, 799, 800, said with respect to the Federal Power Commission's authority to regulate "sales" of natural gas in interstate commerce for resale under the Natural Gas Act:

> "* * * we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company. * * * *Thus, we are satisfied that Congress sought to regulate wholesales of natural gas occurring* at both ends of the interstate transmission systems." (Emphasis added.)

Mr. Justice Frankfurter, in his concurring opinion, interpreted the purpose of the Natural Gas Act by using this language:

> "However, since sales for resale, or so-called 'wholesales', in interstate commerce are not local in character and are constitutionally not subject to State regulation (see Missouri v. Kansas Gas Co., 265 U.S. 298, and Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83), the basic purpose of the legislation is to occupy this field in which the States may not act." (347 U.S. 672, at 686)

Again in 1955 in *Natural Gas Pipe Line Co.* v. *Panoma Corp.*, 349 U.S. 44, 45, 99 L. Ed. 866, 75 S. Ct. 576, this Court, referring to the question whether Oklahoma could regulate the price to be paid for natural gas after its production and gathering had ended, by a company which transports the gas for resale in interstate commerce, said:

> "* * * We held in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794, that such a sale and transportation cannot be *regulated* by a state but are subject to the *exclusive regulation* of the Federal Power Commission." (Emphasis added.)

In 1958, this Court reversed the decisions of the Oklahoma and Kansas Supreme Courts, holding again that a state had no authority to regulate the price of natural gas sold in interstate commerce for resale even though such sale occurred at or near the wellhead of the producers' wells. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381; *Phillips Petroleum Co.* v. *Corporation Commission of the State of Oklahoma*, 355 U.S. 425, 2 L. Ed. 2d 412, 78 S. Ct. 409, 410.

15 U.S.C.A. 717 (a), 52 Stat. 821, specifically declares:

> "* * * that *Federal regulation* in matters relating to the transportation of natural gas and the *sale thereof in interstate and foreign commerce is necessary in the public interest.*" (Emphasis added.)

In the face of these recent easily understood decisions of this Court, the Supreme Court of Kansas, in these appeals now before the Court, erroneously concluded:

> "As above noted, we are quite well aware that Northern is engaged in the transportation and sale of natural gas in interstate commerce by pipe line. We do not believe, however, that the matters dealt with in this case affect interstate transportation or sale in any respect. That is, the matters dealt with in this case pertain to 'production and gathering of natural gas'. (15 U.S.C.A., Sec. 717 (b))" *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. 355, 361, 362 P.2d 599 (R. 157, 165).

This quoted language of the Supreme Court of Kansas contains the same faulty reasoning used by that Court in

sustaining the validity of the gas price fixing order of the same Commission, which this Court reversed in a one sentence per curiam opinion in *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381.

In 1961, in the case of *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1, 19, 20, 5 L. Ed. 2d 377, 390, 81 S. Ct. 435, in interpreting the Natural Gas Act with respect to the jurisdiction of the Federal Power Commission thereunder as opposed to possible state regulatory authority, this Court said:

> "• • • Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. Compare Guss v. Utah Labor Relations Board, 353 U.S. 1, 1 L. Ed. 2d 601, 77 S. Ct. 598, 609. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs."

In view of this Court's explicit holding in the *Natural Gas Pipeline Co.* case, *supra*, that the Federal Power Commission has exclusive jurisdiction to regulate "a sale and transportation," the "no man's land" of regulatory authority has been occupied and the question has already been resolved contrary to the holding of the Kansas Supreme Court in these cases.

If the Kansas Supreme Court had examined the decisions construing 15 U.S.C.A., Sec. 717 (b), it would have easily ascertained that the matters dealt with in these appeals *do not* pertain to the production or gathering of

natural gas. In no less than six cases[2] the courts have said that the production and gathering exemption applies only to the physical activities, facilities and properties used in the production and gathering of natural gas. When a sale in interstate commerce for resale is being made, the exemption *cannot* apply. This conclusion has never been more succinctly stated than in the opinion of the District Court in *Federal Power Commission* v. *J. M. Huber Corporation*, 133 F. Supp. 479, 482, fn. 3:

> "In short, as the words are used in Section 1 (b) a sale in interstate commerce for resale can never be part of the producing and gathering process."

Lower federal courts have had numerous occasions to apply the law enunciated by this Court in the above cited decisions. As expected, all of such courts have uniformly held that the Federal Power Commission has exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. They have likewise consistently held that, where such a sale is involved, the "production or gathering" exemption of 15 U.S.C.A. 717 (b) does not oust the Federal Power Commission of jurisdiction to regulate such sales. See, *e. g.*, *Federal Power Commission* v. *J. M. Huber Corporation*, 133 F. Supp. 479; *J. M. Huber Corporation* v. *Federal Power Commission*, (C.A. 3) 236 F.2d 550; *Deep South Oil Co. of Texas* v. *Federal Power Com'n*, (C.A. 5) 247 F.2d 882; *Saturn Oil & Gas Company*

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2. *Colorado Interstate Gas Co.* v. *Federal P. Com.*, 324 U.S. 581, 89 L. Ed. 1206, 65 S. Ct. 829; *Interstate N. G. Co.* v. *Federal Power Com.*, 331 U.S. 682, 91 L. Ed. 1742, 67 S. Ct. 1482; *Federal Power Commission* v. *Panhandle E.P.L. Co.*, 337 U.S. 498, 93 L. Ed. 1499, 69 S. Ct. 1251; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794; *Deep South Oil Co. of Texas* v. *Federal Power Com'n*, (C.A. 5) 247 F.2d 882; *Saturn Oil & Gas Company* v. *Federal Power Com'n*, (C.A. 10) 250 F.2d 61, cert. denied 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542.

v. *Federal Power Com'n*, (C.A. 10) 250 F.2d 61, cert. den. 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542; *Continental Oil Company* v. *Federal Power Commission*, (C.A. 5) 266 F.2d 208.

Demonstrating the intent of Congress to "create a comprehensive and effective regulatory scheme" in enacting the Natural Gas Act (*Panhandle E. Pipe Line Co.* v. *Public Serv. Com.*, 332 U.S. 507, 520, 92 L. Ed. 128, 68 S. Ct. 190) are a series of cases both in this Court and in lower courts. In *Atlantic Ref. Co.* v. *Pub. Serv. Com. of New York* (1959), 360 U.S. 378, 3 L. Ed. 2d 1312, 79 S. Ct. 1246, amendment denied 361 U.S. 801, 4 L. Ed. 2d 53, 80 S. Ct. 42, this Court held that the duty imposed upon the Federal Power Commission by the Natural Gas Act with respect to the certification of sales and service requires it to ascertain if the proposal is fully supported by evidence showing it to be in the present or future public convenience or necessity, and that the rates or prices at which such sale is proposed to be made are not the only factor bearing on the public convenience and necessity. In the case of *Panhandle Eastern Pipe Line Co.* v. *Federal Power Com'n*, (C.A. 3) 232 F.2d 467, cert. den. 352 U.S. 891, 1 L. Ed. 2d 86, 77 S. Ct. 129, the court held in general that when Congress gave the Federal Power Commission control over the transportation of interstate natural gas, that necessarily included control of functioning of pipeline facilities, and since these are limited, new services are subject to Commission authority. It was held in *Sunray Mid-Continent Oil Co.* v. *F.P.C.* (1960), 364 U.S. 137, 4 L. Ed. 2d 1623, 80 S. Ct. 1392, reh. den. 364 U.S. 856, 5 L. Ed. 2d 80, 81 S. Ct. 32, that irrespective of private contract provisions limiting the duration of the sales and service covered by such contract the Federal Power Commission alone had the jurisdiction to determine when and if it was in the public

interest to abandon service. See Section 7 of the Natural Gas Act, and particularly subparagraph (b) thereof (15 U.S.C.A. 717 (f)). Although the physical activities, facilities and properties used in the production and gathering of natural gas may be exempt from jurisdiction of the Federal Power Commission under the Natural Gas Act, the moment there is a sale, as there is here, in interstate commerce for resale that exemption ceases to apply. *Saturn Oil & Gas Co.* v. *Federal Power Commission,* (C.A. 10) 250 F.2d 61, cert. den. 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542.

The Kansas Supreme Court's conclusion that the Federal Power Commission's jurisdiction over sales of gas in interstate commerce for resale only applies to price is clearly erroneous. If that were true, then Congress in passing the Natural Gas Act failed "to create a comprehensive and effective regulatory scheme".

If the Federal Power Commission is to exercise jurisdiction over an interstate pipe line's facilities and sales at the sales end thereof, it is necessary that it exercise jurisdiction over the volumes of gas sold to each company at the purchase end in the field. Compare *Saturn Oil & Gas Co.* v. *Federal Power Commission, supra.* This is consistent with the rationale of *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794, that if the Federal Power Commission is to exercise its jurisdiction as to the price at which such an interstate pipe line sells its gas such Commission must exercise its jurisdiction over the price at which such gas is sold to such interstate pipe line. Clearly the jurisdiction of the Federal Power Commission cannot be defeated by state regulatory action as here involved.

The all-inclusive jurisdiction of the Federal Power Commission over gas sales contracts between natural gas

companies and services to be rendered thereunder includes the exclusive jurisdiction to modify the terms thereof relating to services, thereby assuring protection of the consuming markets (15 U.S.C.A. 717 (c)).

Clearly, the Kansas Commission actions were in violation of the provisions of the Natural Gas Act and in contravention of the decisions of this Court construing the same, which determined that the exclusive jurisdiction to regulate such a sale in all its aspects is lodged in the Federal Power Commission.

II

The Kansas Orders and Rule Complained of Do Not Effectuate a Legitimate State Policy and the Operative Effect Thereof Is to Regulate the Sales of Gas in Interstate Commerce for Resale in Violation of the Natural Gas Act.

That both Orders and Rule are leveled directly at Northern, there can be no doubt, irrespective of the fact that the Rule itself is cast in general terms (R. 14). The Kansas Commission was well aware of Northern's contractual obligations to Republic Natural Gas Company. Evidence and testimony fully expository thereof were considered by the Kansas Commission in promulgating its Order directed to Northern dated October 7, 1959. The record in such proceeding was incorporated in full in the docket in which the Kansas Commission promulgated its Rule effective February 8, 1960, and rescinded the earlier Order (R. 5).

The Kansas Commission had granted allowables to the Kansas Hugoton Gas Field in excess of total field production by approximately 130 billion cubic feet and the wells in such field connected to Northern, other than the said Republic "A" wells, were substantially underproduced.

because Northern simply did not have the market requirements for gas from such field to permit it to purchase and receive the amount of gas from this field that the Kansas Commission had demanded[3] (R. 87-88).

Armed with the knowledge that Northern was obligated to purchase and receive under the Republic "A" contract (Republic F.P.C. Rate Schedule) the legal allowables from the Republic "A" wells (*Northern Natural Gas Company* v. *Republic Natural Gas Company*, 172 Kan. 450, 241 P.2d 708), the Kansas Commission thought it saw an opportunity to force Northern to purchase for its interstate pipe line system increased sales volumes of gas from the Kansas portion of the Hugoton Field by requiring it to purchase ratably among all the wells in the field to its system connected, but requiring Republic to do nothing. This exposed Northern to heavy penalty under the Kansas statute if it did not comply with such purported ratable take Orders and Rule. G.S. 1949, 55-708, 709 and 710.

On the other hand if Northern did obey such Orders and Rule, which it has done, it ran the hazards of threatened suits by Republic against it for money in substantial amounts (running into millions of dollars) for alleged breach of contract, since Northern's market requirements for gas from such field were not sufficient to enable it to purchase the Kansas Commission fixed allowables from the wells under the Republic "A" contract and also the Kansas Commission fixed allowables under its other 125 gas purchase contracts in said field. As a matter of fact such threatened litigation by Republic against Northern

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3. The validity of such Kansas Commission orders is being contested in numerous cases docketed and pending in the Supreme Court of Kansas, including those numbered 41515, 41516, 41555, and 41556.

did materialize after Northern had started complying with such Orders and Rule.[4]

While it is Northern's position that in event the challenged regulations should herein be determined to be valid, necessarily the contract obligations would have to yield thereto, the Kansas Commission would appear to have taken a contrary position in its Order dated October 7, 1959 (R. 99-101). Now it has seemingly reversed its position again in its Motion to Dismiss at pages 16 and 17 thereof.

It was necessarily clear to the Kansas Commission that the only way Northern could comply with the challenged Orders and Rule and thereby avoid the imposition of statutory penalties—and at the same time avoid the hazards of possible law suits by Republic for alleged breach of contract—was to increase its purchases from all the other wells connected to it in the Kansas Hugoton Field up to the minimum rate required by the Republic "A" contract (Republic's F.P.C. Gas Rate Schedule). Thus is made clear the Kansas Commission's real and underlying purpose in issuance of the challenged regulations—to require Northern to purchase increased volumes of gas from the Kansas portion of the Hugoton Field.

An excellent analysis disclosing complete understanding of the problem faced by Northern in these cases may be found in Mr. Justice Schroeder's dissenting opinion, 188 Kan. 355, 363, 362 P.2d 599 (Jurisdictional Statement, Appendix A, Page XIII).[5]

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4. *Republic Natural Gas Co.* v. *Northern Natural Gas Co.*, Nos. 4161 and 4235, currently pending in the District Court of Stevens County, Kansas, to recover damages for alleged breach of contract for failure to purchase gas, in amounts aggregating in excess of $26,000,000.00.

5. Mr. Justice Schroeder remarked, *inter alia*:

"The record discloses that for the entire period from April, 1944, through February, 1958, there were no important

It would appear to be clearly manifest that the unratable production existing in the Kansas Hugoton Field was brought about in these cases by (a) Kansas Commission's own acts in fixing an unrealistic and arbitrary market demand in the Kansas Hugoton Field creating fictitious well allowables therein, and (b) Kansas Commission dedicating its policy not to conservation and the protection of correlative rights as authorized by the Kansas statutes and required by the Basic Proration Order for the Kansas Hugoton Field, but rather to the forcing of more gas from the field to be sold in interstate commerce for resale so that the Kansas portion of this interstate gas field would receive what Kansas Commission believes to be that field's

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differences between the ratable purchases by Northern from Republic 'A' wells and other wells to which it was connected. The difference in ratio was less than one times the January allowable for essentially the entire period.

"However, in the spring of 1958, a wide difference in Northern's purchases appears between the Republic 'A' wells and the others.

"The reason stated to the Commission and assigned by Northern for this difference is '* * * First, as the Commission is well aware, *allowables granted by the Commission to the field have exceeded the total field production by approximately 130 billion cubic feet* and the wells connected to Northern, other than the Republic 'A' wells, have become substantially underproduced. Second, is the fact that Northern has been seriously delayed in expanding its system into new markets for gas by reason of the failure of the Federal Power Commission to issue the necessary Certificates of Public Convenience and Necessity. * * *' (Emphasis added).

"Testimony on behalf of Northern was that given sufficient time it would be able to conduct its operations in such a way that the taking from the wells to which it was connected would be ratable. This was based *on the assumption that the Commission's future allowable assignments will be realistic*, and on the further assumption that the necessary expansion certificates will be issued to Northern by the Federal Power Commission.

"It must be recognized that Northern's Republic 'A' contract is subject to all valid legislation with respect to gas purchases in the Hugoton Field, either state or federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction. (See,

fair share of the interstate markets of the respective pipeline companies purchasing gas therein."

As noted heretofore, the Hugoton Gas Field sprawls across three States, Kansas, Oklahoma and Texas. As this

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Northern Natural Gas Co. v. *Republic Natural Gas Co.*, 172 Kan. 450, 478, 241 P.2d 708.) The testimony on behalf of Northern was that as far as facilities were concerned, it was not physically impossible for Northern to take gas ratably from the Republic 'A' wells and all other wells connected to its system. The evidence further disclosed that if the markets were sufficient so that Northern could take the current allowables from the Republic 'A' wells and also take the current allowables from all other wells connected to it, then Northern's take would be ratable as between all wells connected to its system. In other words, *when the market conditions are at the same level as the allowables then the same return of take would exist between the Republic 'A' wells and all other wells to which Northern was connected.*

"Theoretically, when these facts are considered in the light of the Basic Proration Order for the Hugoton Field and the statute pursuant to which it was promulgated, if the Commission is not derelict in its duty *to correlate allowable production with the market demand*, all wells of necessity would be *produced* ratably without supplementation by any order or rule to control the *purchasers* of gas in the Hugoton Field. Taking into consideration the entire history of Northern's purchases of gas in the Hugoton Field starting from April, 1944, the above theory seems to have practical application.

"It is readily apparent that any effort to control the purchase of gas, which of necessity on the facts before the Court in the instant case is limited to those wells connected to Northern's gathering system and pipe line, cannot protect the correlative rights of all producers from the common source of supply in accordance with the mandate of the statute. It fails to take into consideration those wells, potentially capable of production, which have no market for their gas, and the differential in markets among the various purchasers of gas from the common source of supply. Therefore, if the Commission fails to exercise its power *to correlate production with demand*, it cannot accomplish the mandate of the statute, and resort to a method which requires *the purchasers* of gas in the Hugoton Field to take (purchase) ratably from the wells to which each is connected is little more than a futile gesture." (Emphasis added by Court) (Insert supplied by appellant).

6. The Kansas Commission has been in recent years committed to a policy of attempting to force interstate purchasers to increase their purchases of gas from the Kansas Hugoton Gas

Court said in *F. P. C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 5 L. Ed. 2d 377, 81 S. Ct. 435, one of such producing States in a common source of supply might wish to prolong its gas reserves for as long as possible while another might desire to deplete the field as rapidly as possible. The rule, as stated by this Court in *U.S.* v. *Louisiana*, 363 U.S. 1, 33, 4 L. Ed. 2d 1025, 80 S. Ct. 961, that a land boundary between two states marks the place where the full sovereignty of one state ends and that of another begins, points up very clearly the impact on interstate marketing of gas from this single interstate common source of supply when one state attempts to conserve its gas and another decides to force speedy depletion of this exhaustible natural resource.[7]

If each gas producing state has the jurisdictional right, either exclusively or concurrently with the Federal Power Commission, to control such sales, there must necessarily result a lack of uniformity in the construction or modification of the controlling rate schedules resulting in complete

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Field in interstate commerce for resale. (See paper of Richard C. Byrd, Commissioner (now Chairman), Kansas Corporation Commission, entitled *Contractual and Property Rights As Affected by Conservation Rules and Regulations*, published in 10th Annual Institute on Oil and Gas Law and Taxation by the Southwestern Legal Foundation, Dallas, Texas, at page 1 and particularly pages 13 through 15.) (As noted heretofore (Fn. 3), the validity of Kansas Commission market demand orders effectuating such policy is being contested in numerous earlier cases docketed and pending in the Supreme Court of Kansas, including those numbered 41515, 41516, 41555 and 41556.)

7. Analogous to this situation is the competition between Oklahoma and Kansas to fix prices for gas produced and sold in interstate commerce from the Hugoton Field. Oklahoma's price fixing efforts were stricken down by this Court in *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576, while the Kansas effort to fix an even higher price was stricken down by this Court in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381.

confusion and the stripping of all vitality from the jurisdiction of the Federal Power Commission over sales of gas in interstate commerce for resale.

The objectives of the Kansas Commission in these appeals, as analyzed herein and approved by the Supreme Court of Kansas, are not legitimate State objectives. Although the Orders and Rule, here involved, ostensibly have as their purpose the regulation of production, it is significant that the one is directed to Northern as a purchaser and the other is directed to all purchasers in the field. They do not regulate production since production of gas has ended at the point the purchaser takes (i. e. purchases) gas from the producer. Production is "the act of bringing forth gas from the earth." *Saturn Oil & Gas Co.* v. *Federal Power Com'n.*, (C.A. 10), 250 F.2d 61, 64, cert. den. 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542. Under the Republic "A" contract (Republic F.P.C. Gas Rate Schedule), gas is purchased by Northern at the point of delivery which is designated as the point at which Northern's pipe lines connect to Republic's facilities at the wellhead (R. 143-144). At such point production has been completed and the sale of the gas is subject to the exclusive regulation of the Federal Power Commission. *Continental Oil Company* v. *Federal Power Commission* (C.A. 5), 266 F.2d 208.

Assuming arguendo, that State regulation of production itself may be within the "production and gathering" exemption of the Natural Gas Act (15 U.S.C.A. 717 (b)), merely calling these regulations (Orders and Rule), regulations of production does not make them so, nor extend the cloak of such exemption. This Court made it plain in the recent case of *Gomillion* v. *Lightfoot*, (1960) 364 U.S. 339, 347, 5 L. Ed. 2d 110, 117, 81 S. Ct. 125, that:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal

judicial review. *But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an 'unconstitutional condition'.*" (Emphasis added).

Two things are really at issue here: Does the State of Kansas have the power to regulate sales and purchases of such gas in interstate commerce for resale; and may Kansas do indirectly what it cannot do directly; i. e., force Northern to purchase more gas from the wells to it connected in the Kansas Hugoton Gas Field? At one of the hearings before the Commission, an expert witness testifying for Cities Service Oil Company, which owned wells connected to Northern's pipeline in the field, stated that there were two alternative solutions to the unratable situation in the field: "One is to raise the total Northern Natural's takes up until they are ratable with the Republic 'A' group, and *second would be to lower Republic 'A' by curtailing their production, so they will become ratable with the balance of the field.*" (Emphasis added) (R. 33).

The Kansas Commission chose the first of such suggested alternatives. The regulations complained of were addressed exclusively to purchasers. It is clear, therefore, that the objective of the Kansas Commission in promulgating these regulations was neither conservation nor protection of correlative rights, but rather to force Northern to more speedily deplete the reserves underlying the wells to it connected in the Kansas Hugoton Gas Field.[8]

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8. Kansas Supreme Court refers to testimony that Northern's facilities would permit taking ratably from all wells in the field to its system connected. Of course that was true to the extent of its market demand and facilities in such "field". That

The orderly administration of the Natural Gas Act requires that this Court strike down this latest attempt by the State of Kansas to regulate sales of natural gas in interstate commerce for resale just as it did in the recent state minimum price cases.[9]

CONCLUSION

The judgments of the Supreme Court of the State of Kansas should be reversed.

Respectfully submitted,

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October, 1962

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did not mean that Northern could purchase the production from all such 1100 wells up to the contract requirements under the Republic "A" contract. Rather it was compelled to purchase less than the net Kansas Commission allowables of the Republic "A" wells so that production therefrom would be ratable with the purchases by Northern from the other wells in such field connected to its pipeline. Here the Kansas Commission endeavored to compel Northern to accelerate depletion of its contracted reserves and only the Federal Power Commission has the jurisdiction to determine whether or not that would be in the public interest.

9. *Natural Gas Pipe Line Co. v. Panoma Corp.*, 349 U.S. 44, 99 L.Ed. 866, 75 S. Ct. 576; *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381.

APPENDIX A

No. 42,128

NORTHERN NATURAL GAS COMPANY,
Appellant,

v.

STATE CORPORATION COMMISSION,
Appellee.

Syllabus by the Court

1. Gas—*Powers of Corporation Commission—Ratable Taking by Purchaser.*

The provisions of G.S., 1959 Supp., 55-703 are considered and held to be sufficient to give the Corporation Commission powers to pass rules to insure the fair and equitable taking of natural gas from a common source, and in such an attempt to provide for the ratable taking of natural gas by a purchaser.

2. Same—*Order of Commission—As to Ratable Taking by Purchaser—Validity.*

It is further decided that such an order as described in the first paragraph hereof did not impair the obligation of a contract possessed by the purchaser or impinge upon other constitutional rights of the purchaser.

3. Same—*Order of Commission—As to Ratable Taking by Purchaser—Federal Power Commission's Authority Not Impaired.*

It is also further decided that the order of the Commission as to the ratable taking of natural gas concerns

only the production and gathering of gas and in no way impairs the control of the Federal Power Commission over the transportation of natural gas in interstate commerce under the federal Natural Gas Act, 15 U.S.C.A., §717 *et seq.*

Appeal from Finney district court; ROLAND H. TATE, judge. Opinion filed June 10, 1961. Affirmed.

Mark H. Adams II of Wichita argued the cause, and *Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, John S. Seeber* and *Floyd E. Jensen*, of Wichita; *Lawrence I. Shaw, F. Vinson Roach*, and *Patrick J. McCarthy* of Omaha, Nebraska; *Ray H. Calihan, Logan N. Green, Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, of Garden City were with him on the briefs for the appellant.

Charles C. McCarter, general counsel, argued the cause, and *S. F. Fleeker*, assistant general counsel, was with him on the briefs for the appellee.

The opinion of the court was delivered by

JACKSON, J.: The appellant Northern Natural Gas Company began a judicial review action in the court below to review an order of the Corporation Commission directing it to take gas ratably from all gas wells in the Kansas Hugoton Gas Field to which its lines were connected including the gas wells owned by Republic Natural Gas Company with which company it had a special contract as to the purchase of gas. The district court affirmed the order of the Commission, and the appellant brings the matter to this court on an appeal from the district court's decision.

Throughout the remainder of this opinion we shall refer to the above parties as "Northern," "Republic," and the "Commission."

For many years Northern and Republic have been parties to a contract under which Northern agreed to take and pay for a sufficient amount of natural gas to supply 60% of the supply needed by Northern to satisfy the needs of its customers in a certain area in Iowa and Nebraska. The exact location of this area in Nebraska and Iowa is not important, but it is referred to in the briefs as the Omaha District. This contract covers only some 144 wells owned by Republic and in the briefs this group of wells is referred to as the "Republic A" wells.

The above contract has been before this court in the former case of *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708, in which opinion a more detailed account of the contract may be found.

There can be no question that Northern is engaged in the interstate transportation of natural gas by pipe line for sale in states other than Kansas, as defined in the Natural Gas Act. In the last case mentioned, the question at issue was the amount of gas which could be lawfully produced under the above contract and regulations of the Commission. The important part of the syllabus of the case just cited reads: "An operator of gas wells . . . as to the amount of gas he can produce from the wells, is governed by the allowables for such wells made by the commission for the time in question and not by slightly less than three times such allowables."

Another case which is connected wth this same contract between Republic and Northern is that of *Republic Natural Gas Co.* v. *State Corporation Commission*, 173 Kan. 172, 244 P.2d 1196. Those interested in an account of the manner of establishing proration allowables for gas wells in the Hugoton field are directed to the opinion in

the last mentioned case. The case affirmed the Commission in making an order refusing to reinstate canceled "underages" of certain gas wells owned by Republic. The canceled underages had been canceled according to the rules of the Commission applying to the entire Hugoton field.

As early as 1938, Northern had begun to purchase additional gas supply in the Hugoton field in addition to the Republic "A" wells. In 1949, Northern entered into a gas purchase contract with Cities Service Oil Company. Thereafter, Northern purchased other gas supply and now owns some 125 gas purchase contracts.

These gas purchase contracts cover a total of some 1,100 gas wells in the Hugoton field. Such contracts contain provisions for the ratable taking of gas between all gas wells with the exception that Republic "A" wells are specifically excepted from the provision for ratable taking and are given preference where the demand for gas does not equal the allowables for all of the wells. A copy of such contracts [*sic*] is contained in the abstract but need not be reproduced in this opinion.

Northern's position is quite clearly and forcefully stated in the following quotation taken from its brief:

> "As Northern has interpreted its commitments under its gas purchase contracts in such field, when Northern's market requirements from the field are less than the total allowables assigned to the wells connected to Northern, Northern's contractual commitment (as previously interpreted by the Court) under the Republic 'A' contract is first deducted from Northern's gas requirements and allocated to the Republic 'A' wells. The balance of Northern's requirements is then allocated ratably to all other wells to it connected in such Field."

Northern further tells us that from 1944 until 1958, Northern was largely able to take ratably from all wells connected with its lines, but it seems to concede that during 1958, it took gas from Republic "A" wells at a much greater rate than from the rest of the wells connected to its gathering lines. In January, 1959, the Cities Service wells connected to Northern's lines had a monthly allowable of 2,084,874 Mcf. They had an underage of 11,411,727 Mcf., and 123,711 Mcf. of these underages were canceled by the Commission under its general rules as being underproduced in excess of six times the January current allowable. Northern's other connections aside from Republic "A" wells had a January current allowable of 9,309,441 Mcf. and a total underage of 48,604,070 Mcf.

The net status of these wells was 522.09 percent under produced, and they suffered cancellation of 409,393 Mcf. of the aforementioned underage.

In contrast, Republic "A" wells had a current January allowable of 2,674,390 Mcf. and an overage of 114,858 Mcf. They were overproduced 4.29 percent in that particular month.

Northern makes no claim that it would not have been possible to take gas ratably from all of its wells. It only claims that the contract with Republic gives it the right to prefer Republic "A" wells.

On May 27, 1959, the Commission on its own motion took notice of the above situation and issued an order to Northern to show cause why it should not take ratably from the wells to which it is connected in the Hugoton field in Kansas. The hearing was set first on June 26, 1959, but later continued to July 24, 1959 and the order appealed from was issued October 7, 1959.

At the hearing before the Commission, an expert witness testified as follows:

> "... I have expressed an opinion that there is drainage occurring. Our studies indicate that if the wells are produced with the same percent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected. There are two ways of accomplishing this currently in the Hugoton Field. One is to raise the total (of) Northern Natural's takes up until they are ratable with the Republic 'A' group, and second would be to lower Republic 'A' by curtailing their production, so they will became ratable with the balance of the field."

We do not read the record to show that there is any contention but that drainage was occurring, and that the underproduced wells were losing the right to produce gas from the common source of supply to the great damage of the owners of the wells in the loss of their correlative rights.

While the members of this court make no claim to be experts in the science of the production of natural gas, we believe that the court may take judicial notice of the fact that where natural gas is within the earth in one common source and is under pressure, if one gas well is allowed to take gas, this will result in the pressure being lowered around the vicinity of this gas well so that the gas in the common source will tend to drain or rush to the vicinity of the well taking gas. The result will be that the other wells in the common field or source will be able to produce much less gas and the owners of such wells will have suffered a definite loss.

It should be noted at this time that shortly after the issuance of the order of the Commission dated October 7,

1959, directed only to Northern and which is appealed from in this present proceeding, the Commission, after due notice and hearing, issued a general rule applicable to all takers of natural gas from the Hugoton gas field and requiring that all takers of gas take ratably from the wells to which they are connected. Northern's appeal from that general order is to be found in *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. 351, 362 P.2d 609.

In attempting to sustain its position in the present case, Northern first contends that our state Natural Gas Act does not provide for ratable taking; that the act applies only to producers of gas; that Northern is a purchaser of gas and a natural gas company engaged in interstate commerce. It refers to section 55-703, G.S., 1959 Supp., and stresses the first part of the section which refers to producers. But Northern has ignored the latter part of the section wherein the following language is found:

> "The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent."

In Summers on *Oil and Gas*, Vol. 1A, sec. 103.1, p. 139, wherein the eminent author is dealing with ratable taking

of oil and gas, that part of section 55-703 set out above is noted and the author concludes as follows:

> "The Kansas gas conservation act authorizes the state corporation commission to so regulate the taking of gas from any common source of supply as to prevent inequitable and unfair taking. This act does not expressly state that purchasers of gas in the common source of supply may be required to take ratably from all wells with which their pipe lines may be connected, *but unless the commission has such authority it cannot prevent inequitable and unfair taking.*" (Italics supplied)

It will be noted that the Commission is authorized to make rules and regulations for the purpose of accomplishing the results to which the Commission is directed; and that such rules and regulations have the force and effect of law when filed in the office of the revisor of statutes (G.S. 1949, 77-410).

In search of Commission's Rule 82-2-101, which has been so filed, we find the following: "Taker: See purchaser." And in the same rule, purchaser is defined as follows:

> "Purchaser shall mean any person who directly or indirectly purchases, transports, takes, or otherwise removes production to his account from a well, lease or common source of supply. Purchaser is usually considered to be the person holding the division order." (Italics supplied) (*Sic*)

We believe Northern is mistaken in arguing that the above statute and the rules made thereunder do not apply to a purchaser of natural gas. We are only more convinced that the legislature had this in mind, by the fact that natural gas cannot be produced unless someone is ready to buy it, it cannot be stored in a tank on the lease.

Therefore, as Professor Summers says, the object of the quoted provisions of section 55-703 cannot be accomplished unless the taker or purchaser can be controlled. We believe the statute is sufficient to reach Northern.

We note that in its brief, the Commission has directed attention to certain language in the opinion of *Republic Natural Gas Co.* v. *State Corporation Commission*, supra. While the whole opinion in that case is in line with what we are now deciding, the precise question now before us was not there involved.

The second objection to the validity of the order of the Commission appealed from is sweeping in its coverage and reads as follows:

"II

"Said order as approved by the trial court is arbitrary, unreasonable and discriminatory, has no relation to proration or conservation of gas, burdens interstate commerce and takes appellant's property and contract rights, all in violation of the commerce clause, the contract clause and the fourteenth amendment to the federal constitution, and the Kansas Bill of Rights, sections one, two and eighteen, and section seventeen, article two of the Kansas constitution."

Despite the sweeping indictment of the order, Northern really seems to simply argue that the contract has established the correlative rights of the parties, and that therefore, the state is powerless to prevent waste and drainage of gas as long as the monthly allowables are not unlawfully exceeded.

We would direct attention to a provision of the contract upon which Northern relies, and which reads:

"SECTION 2. *Commission Jurisdiction.* This contract is subject to all valid legislation with respect

to the subject matter hereof, either State or Federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction."

We cannot agree with the argument that the monthly allowable is the whole story. Certainly, the wells attached to Northern and apart from Republic "A" are losing gas to Republic "A" and possibly to any other taker who is taking gas at a greater rate than Northern is allowing gas to be produced from these wells.

It would seem that ratable taking in the production of natural gas has been late in coming before this court for approval. The Supreme Court of Oklahoma upheld an order of the Corporation Commission of that state providing that a purchaser of natural gas must take gas from a producer having no contract with the purchaser and must also take ratably from the aforesaid producer; see *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Okla. 35, 220 P.2d 279, affirmed on appeal, 340 U.S. 179, 95 L. Ed. 190, 71 S. Ct. 215.

It would appear to us that the opinions of the Supreme Court of Oklahoma and of the Supreme Court of the United States in the above case foreclose any of Northern's arguments in the case at bar. There was a matter of contract involved in the Peerless case. Cities Service undoubtedly thought they had a right to take gas from the wells from which it had contracted to buy gas, and that it had no duty to contract with Peerless. But it was held that the state might prevent drainage of gas from the Peerless wells despite the contracts held by Cities Service.

Certainly, in view of the above quoted provision of the contract between Northern and Republic, there has

been no impairment of the obligation of contract in this case or any other impairment of constitutional right.

Lastly, Northern contends that the order of the Commission impinges upon the authority of the Federal Power Commission under the Natural Gas Act, 15 U.S.C.A., §717 *et seq.*

As above noted, we are quite well aware that Northern is engaged in the transportation and sale of natural gas in interstate commerce by pipe line. We do not believe, however, that the matters dealt with in this case affect interstate transportation or sale in any respect. That is, the matters dealt with in this case pertain to "production and gathering of natural gas." (15 U.S.C.A., §717(b)).

It should again be emphasized that the Commission's order did not direct Northern as to the amount of gas which it should take, it only directed that the amount Northern needs shall be taken ratably from all the gas wells which Northern serves. Northern agrees that it could do this, but says it would have to give up its contracted preference to Republic "A" wells. Everyone would be happy if Northern would take the entire monthly allowable from all of the wells served. Northern says that in the near future it believes that it will be able to do this very thing.

We believe that the state may regulate the production of natural gas and the gathering of the same to the extent necessary to insure that the gas under one owner's land will not be drawn off by his neighbor, and that his neighbor cannot plead a contract with a third person to give him a right to drain gas from his neighbor.

All of the matters contained in Northern's brief have been fully considered, and we find that the order appealed from must be affirmed. It is hereby so ordered.

SCHROEDER, J. (dissenting): The Commission by its order directed to Northern assumes it has authority under G.S. 1949, 55-703, as amended, to control and regulate *purchases* of gas by Northern, engaged in the interstate transportation of gas. This, in my opinion, is beyond the authority of the statute.

What the Commission in the instant case (No. 42,128), and in the companion case (No. 42,127), purports to do is to set up one proration system, having application to *purchasers*, within a proration system controlling *production* under the Basic Order for the Hugoton Gas Field adopted on the 21st day of March, 1944, *which was designed and declared by the Commission to "accomplish the purposes for which article 7, chapter 55, General Statutes of Kansas for 1935 was enacted."* (Basic Proration Order for the Hugoton Gas Field, paragraph m.) (Emphasis added.)

By the Commission's order dated October 7, 1959, Northern was directed to take gas ratably from its connections in the Kansas Hugoton Gas Field (Case No. 42,128), and by the Commission's order promulgating Rule 8-2-219 (sic) (Case No. 42,217), all companies *purchasing gas* from a common source of supply under proration by the Commission are required to take gas in proportion to the allowables from all the wells to which each is connected.

The Basic Proration Order for the Hugoton Gas Field, as amended, and in effect at times material, by a system of proration, controls the *production* of gas in the Hugoton Field. The end sought in fixing *production quotas* was to enable each developed lease to currently produce its daily allowable so that ultimately such developed lease would have an opportunity to produce approximately the amount of gas which underlies such lease. It recognized the available production of the wells in the Hugoton Field was far in excess of the market demand, and found:

"f. That since there exists disproportionate *production* from the wells and leases in said field which impairs the correlative rights of many of the owners of developed leases, it is necessary for the Commission to take jurisdiction and to prescribe *regulations for the production of gas* from said wells and others that may be hereafter completed in said field to the end that each person, firm, or corporation *having the right to drill into and produce natural gas from said field may take therefrom only such proportion of the amount that may be produced therefrom without waste* as will permit each well or developed lease to *produce* ultimately at least approximately the amount of gas underlying the land or lease on which such well is located and *currently produce proportionately* with the other wells in said field . . ." (Emphasis added.)

The basic order adopted a formula which was said to have a reasonable relation to the prevention of waste, to the prevention of inequitable and unfair *production of gas from the common source of supply*, and to the prevention of unreasonable discrimination in favor of one *producer* in said field and against another *producer* therein (paragraph m). The order directed that there be held two market demand hearings for each year (paragraph n) to determine the market demand for natural gas from the Hugoton Field for the next succeeding proration periods, and directed the preparation and promulgation of a new schedule of *production* allowable for the wells in said field, *based upon the determination made as a result of the market demand hearing* (paragraph o).

The record presented discloses that pursuant to paragraph "n" of such basic proration order, two market demand hearings for each year were and are held by the Commission, and market demand orders were and are issued for six-month periods (October 1 to March 31 and

April 1 to September 30), in addition to which monthly *proration or allowable orders were and are issued for each month spreading and allocating the market demand and fixing the monthly allowables assigned to each of the producing gas wells in said field.*

The record discloses that for the entire period from April, 1944, through February, 1958, there were no important differences between the ratable purchases by Northern from Republic "A" wells and other wells to which it was connected. The difference in ratio was less than one times the January allowable for essentially the entire period.

However, in the spring of 1958, a wide difference in Northern's purchases appears between the Republic "A" wells and the others.

The reason stated to the Commission and assigned by Northern for this difference is:

> ". . . First, as the Commission is well aware, *allowables granted by the Commission to the field have exceeded the total field production by approximately 130 billion cubic feet* and the wells connected to Northern, other than the Republic 'A' wells, have become substantially underproduced. Second, is the fact that Northern has been seriously delayed in expanding its system into new markets for gas by reason of the failure of the Federal Power Commission to issue the necessary Certificates of Public Convenience and Necessity . . ." (Emphasis added.)

Testimony on behalf of Northern was that given sufficient time it would be able to conduct its operations in such a way that the taking from the wells to which it was connected would be ratable. This was based *on the assumption that the Commission's future allowable as-*

signments will be realistic, and on the further assumption that the necessary expansion certificates will be issued to Northern by the Federal Power Commission.

It must be recognized that Northern's Republic "A" contract is subject to all valid legislation with respect to gas purchases in the Hugoton Field, either state or federal, and to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction. (See, *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 478, 241 P.2d 708.)

The testimony on behalf of Northern was that as far as facilities were concerned, it was not physically impossible for Northern to take gas ratably from the Republic "A" wells and all other wells connected to its system. The evidence further disclosed that if the markets were sufficient so that Northern could take the current allowables from the Republic "A" wells and also take the current allowables from all other wells connected to it, then Northern's take would be ratable as between all wells connected to its system. In other words, *when the market conditions are at the same level as the allowables then the same return of take would exist between the Republic "A" wells and all other wells to which Northern was connected.*

Theoretically, when these facts are considered in the light of the Basic Proration Order for the Hugoton Field and the statute pursuant to which it was promulgated, if the Commission is not derelict in its duty *to correlate allowable production with the market demand*, all wells of necessity would be *produced* ratably without supplementation by any order or rule to control the *purchasers* of gas in the Hugoton Field. Taking into consideration the entire history of Northern's purchases of gas in the

Hugoton Field starting from April, 1944, the above theory seems to have practical application.

It is readily apparent that any effort to control the purchase of gas, which of necessity on the facts before the court in the instant case is limited to those wells connected to Northern's gathering system and pipe line, cannot protect the correlative rights of all producers from the common source of supply in accordance with the mandate of the statute. It fails to take into consideration those wells, potentially capable of production, which have no market for their gas, and the differential in markets among the various purchasers of gas from the common source of supply. Therefore, if the Commission fails to exercise its power *to correlate production with demand,* it cannot accomplish the mandate of the statute, and resort to a method which requires *the purchasers* of gas in the Hugoton Field to take ratably from the wells to which each is connected is little more than a futile gesture.

It must be assumed the legislature was aware of the situation regarding the production and development of gas in this state when 55-703, *supra,* was first enacted in 1935, and when subsequent amendments were made thereto, but it did not expressly authorize the Commission to require purchasers of gas in the common source of supply to take ratably from all wells to which their pipe line was connected. It undoubtedly felt the control of production was sufficient to accomplish the purposes for which the statute was enacted.

An analysis of G.S. 1949, 55-703, as amended, (now G.S. 1959 Supp., 55-703) will disclose the Commission has no jurisdiction over purchases of gas by an interstate pipe line company. Our gas conservation law is Chapter 55, Article 7, and is entitled "PRODUCTION AND CONSER-

VATION OF NATURAL GAS." The applicable section of this statute is 55-703, *supra*. In pertinent part it reads:

> "[1] Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, *then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced* without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. [2] The commission shall so *regulate the taking of natural gas from any and all such common sources of supply* within this state as to prevent the *inequitable or unfair taking from such common source of supply* by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and *in favor of or against any producer* in any such common source of supply . . . " (Emphasis and numbers added.)

In both cases the Commission relies upon the above quoted portion of the statute marked [2], categorically stating this is the source of its jurisdiction.

An examination of this portion of the statute, and those portions thereof which have been italicized, makes

it clear that *the taking referred to,* over which the Commission is to have regulatory jurisdiction under certain circumstances, *is from the common source of supply.* As applied to the Kansas Hugoton Gas Field the common source of supply would be the so-called "Hugoton Pay Zone," or the producing horizon described as gas encountered at an average depth of from 2700 to 2800 feet below the surface within the Kansas Hugoton Gas Field. Therefore, the taking referred to is not a taking from the wellhead, or from a producer, or from the end of a gathering system owned by the producer some miles from the wellhead, but the taking referred to is from the common source of supply.

It must be noted the phrase "person, firm or corporation" used in both the first and second portions of the quoted statute, is defined in the first portion as one *"having the right to produce natural gas."* (Emphasis added.) It is difficult to believe the legislature intended that on the one hand such expression referred to a producer, and on the other hand to a purchaser.

The court in *White Eagle Oil Co. v. State Corporation Comm.*, 168 Kan. 548, 214 P.2d 337, quotes a portion of the first sentence of the section of the statute in question which it construes as being the statutory mandate or declaration of public policy with regard to *production.*

While the Commission's general rules and regulations, in Rule 92-2-101 (sic), under the definition of "taker" refers the reader to the definition of "purchaser," the rules do not give the Commission jurisdiction to regulate purchases, unless such authority is found in the statute. In other words, if the statute does not confer power upon the Commission to regulate the purchases of gas, it cannot confer such power upon itself by the adoption of a rule.

The State Corporation Commission of Kansas has a limited jurisdiction. It possesses no powers not given it by statute. (*Bennett* v. *Corporation Commission*, 157 Kan. 589, 596, 142 P.2d 810; *Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 80 L. Ed. 528, 56 S. Ct. 397; 24 Am. Jur., Gas and Oil, §144, p. 628; and see, *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U.S. 627, 77 L. Ed. 1410, 53 S. Ct. 768.)

On those several occasions over the life of the statute when this court has been called upon to construe 55-703, *supra*, and its companion sections, it has consistently construed such act as a statute giving authority to regulate production, and not purchases. (*Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, supra; and *Republic Natural Gas Co.* v. *State Corporation Commission*, 173 Kan. 172, 244 P.2d 1196.)

In *Republic Natural Gas Co.* v. *State Corporation Commission*, supra, the court in substance said that the continuing duty on the part of the Commission was to cause the *production* of gas from any well to be ratable, in accordance with the provisions of the statute and the basic order; and that no operator or producer had any vested right to produce from any well more gas in any month than was assigned it as its allowable, the entire matter of *producing gas* from a well being subject to the provisions of the basic order and the statute. In other words, under 55-703, *supra*, to "take" gas means to "produce" gas. The essence of the gas conservation statute is that it operates on the operator or producer of the well.

In construing our oil conservation statute, which is very similar to our gas conservation statute, this court in *State, ex rel.*, v. *Sinclair Pipe Line Co.*, 180 Kan. 425, 304 P.2d 930, stated:

"The statutes with reference to waste are G.S. 1949, 55-601 to 55-608, inclusive. The production of crude oil in such a manner as to constitute waste is prohibited by G.S. 1949, 55-601, and made a crime by G.S. 1949, 55-607. *The statute refers only to production.* Sinclair, as we have demonstrated, is engaged strictly in interstate transportation of crude oil. The Oklahoma statute on waste is almost identical to ours. In speaking of that statute, the supreme court of the United States held in *Champlin Rfg. Co.* v. *Corporation Commission*, 286 U.S. 210, 76 L. Ed. 1062, 52 S. Ct. 559:

"'It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products'." (pp. 437, 438.) (Emphasis added.)

It is significant to note that the oil statute, G.S. 1949, 55-603, states in part: ". . . *any person having the right to drill into and produce* oil therefrom may *take* therefrom . . ." (Emphasis added.) (See, Two Cases on Conservation, Vol. 6, J.B.K. p. 149, by H. H. Lesar.)

It is apparent that heretofore the Commission itself has always construed the statute in question as one authorizing the regulation of production, and not purchases. In paragraph "f" of the Basic Proration Order for the Hugoton Gas Field the Commission found "The present and past *production* from the wells in said field is and has been *inequitable* and *unfair*." (Emphasis added.) At another place in paragraph "f" the Commission found "it is necessary for the Commission to take jurisdiction and to prescribe regulations for the *production* of gas." (Emphasis added.)

In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co*, 203 Okla. 35, 220 P.2d 279, the Oklahoma Supreme Court directed Cities Service, a purchaser of gas, to take gas

ratably from other wells in a given field. From this decision the Commission argues that ratable take statutes do in fact apply to purchasers as well as producers.

It must be noted in the state of Oklahoma the legislature has enacted a *common purchasers' statute*, requiring that purchasers of gas shall purchase and transport natural gas from each person or producer ratably, in proportion to the average production, and prohibits such common purchasers from discriminating in price or amount for like grades of natural gas or facilities as between producers or persons. (52 Okl. St. Ann., §23.) Also, the legislature of Oklahoma in its conservation of oil and gas *statute* has defined the term "taker" to include a purchaser of natural gas as follows:

> "(i) The term 'Taker' shall include any person, who, acting alone, or jointly with any person or persons, is directly or indirectly purchasing or transporting by any means whatsoever or otherwise removing oil or gas from any common source of supply in this State. Laws 1947, p. 326, §1." (52 Okl. St. Ann., §86.1.)

It is clear the Kansas Corporation Commission cannot look to the statutes of other states, or to the judicial construction of such statutes, for power to control purchasers of gas in Kansas under the provisions of G.S. 1949, 55-703, as amended.

Both the statute and the Basic Proration Order for the Hugoton Gas Field purport to give the Commission jurisdiction over the regulation of production only. In other words, the "taking" which must be ratable under the statute and the basic order is the *production* of gas from the common source of supply, not the *purchasing* of gas. By a mandatory direction from the legislature the

Commission has jurisdiction over production, so that such production will neither be inequitable nor unfair. The "Order" (Case No. 42,128) and the "Rule" promulgated by the Commission (Case No. 42,127) here under review which is directed to purchasers, rather than operators or producers, and seeking to regulate the purchase of gas, or the manner of making such purchases after production has ceased, rather than to regulate the production itself, are in my opinion invalid because they go beyond the jurisdiction conferred upon the Commission by the statute.

APPENDIX B

No. 42,128

NORTHERN NATURAL GAS COMPANY
Appellant

v.

STATE CORPORATION COMMISSION
Appellee

Opinion Denying Motion for Rehearing

Appeal from Finney district court; ROLAND H. TATE, judge.

Opinion filed August 31, 1961. (For original opinion of affirmance see *ante* p. 355, 362 P.2d 593.)
The opinion of the court was delivered by

JACKSON, J.: In its motion for rehearing Northern disclaims the position of contending that our gas statute G.S. 1959 Supp. 55-703 does not require ratable production of gas from a common source. It says the question is whether the statute also requires ratable purchases of gas. It then warns the court not to invade the jurisdiction of the Federal Power Commission by dealing with purchasers, citing *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035; *Natural Gas Co.* v. *Panoma Corp.*, 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576; *Deep South Oil Co. of Texas* v. *Federal Power Com'n.*, 247 F.2d 882; *Saturn Oil & Gas Company* v. *Federal Power Com'n.*, 250 F.2d 61, cert. denied 355 U.S. 956, 2 L. Ed. 2d 532, 78 S. Ct. 542; *Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P.2d 528, reversed 355 U.S.

391, 2 L. Ed. 2d 355, 78 S. Ct. 381; and *Cities Service Gas Co.* v. *State Corporation Commission,* 184 Kan. 540, 337 P.2d 640.

We had read those cases before the opinion in this case was announced, and we believe those cases all dealt with the question of the power to regulate the price of gas. As we tried to point out in the opinion as filed, this case in no way involves the price of gas. Northern studiously avoids that fact. Moreover, the ratable taking order does not regulate the total amount of gas which Northern may take. We fail to see how the order affects interstate commerce in any way.

Northern magnanimously states that the state may control the ratable production of natural gas, but fails to inform us how this can be done unless the producer can find a "taker" for his gas.

It is not important in this case that the purchaser has a contract to purchase the gas at a price, which we will assume is subject to the regulation and jurisdiction of the Federal Power Commission, but the only important matter is that the "taker" take gas so that it may be produced. This case involves nothing to our knowledge which has anything to do with the price paid by the purchaser for gas, nor how much gas he buys. The only matter here involved is whether the taker must take ratably from all wells to which he is connected and thus preserve the rights of the land owners.[1] We again refer to the statement of Professor Summers of the University of Illinois

1. Reference might again be made to that part of G.S. 1959 Supp. 55-703, which is quoted in the original opinion, and to the discussion in the late case of *Renner* v. *Monsanto Chemical Co.*, 187 Kan. 158, p. 170, 354 P.2d 326, relating to the proration and ratable taking as to oil.

School of Law set out in the original opinion to show that ratable production can not be accomplished unless the taker will take gas ratably.

Northern has in this case cast some reflection upon the increase of allowables in 1958 by the Kansas Commission. The record contains no facts concerning this action of the Commission. But we must assume that the Commission believed that the market was sufficient to warrant the increase. Moreover, if we are justified in taking judicial notice of facts, we must also assume that the Kansas allowables were not greater than the Oklahoma allowables. And we notice that it was generally thought to be a fact that drainage of gas was occurring from the Kansas Hugoton field to that part of the field in Oklahoma.

Thus, in 1958, the Commission may have been, in a roundabout way, endeavoring to set up ratable taking as between Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells.

Of course, none of this is involved in the record of the case before us. However, we may direct attention to the news story on page 54, in *Newsweek* for July 10, 1961, entitled *Natural Gas: Two Straws*. It is there noted that the Hugoton field covers some 4.1 million acres in Kansas, Oklahoma and Texas; that most of the estimated 300 trillion cubic feet of gas in the field lies under Kansas soil, but that Oklahoma supplies the major share of the 2 million cubic feet pumped daily northward through the pipe lines.

The motion for rehearing is denied.

Schroeder, J., is of the opinion the judgment of the trial court should be reversed, and therefore dissents.

APPENDIX C

NEWSWEEK Magazine
July 10, 1961

Natural Gas:

TWO STRAWS

The biggest border feud since Missouri slaveholders tried to take Kansas away from the abolitionists a century ago was shaping up last week over a vast, $30 billion pocket of natural gas that lies under 4.1 million acres of prairie land in Southwest Kansas, the Oklahoma panhandle, and northern Texas. Most of the estimated 300 trillion cubic feet of gas in the Hugoton field, as it is known, lies under Kansas. But Oklahoma supplies the major share of the daily 2 million cubic feet that is pumped northward through pipelines—and Kansans don't like that at all.

"It's as though there were two straws in the same chocolate soda," a Kansas Official explained last week. "If the soda is sucked up faster through one straw, the man on the end of that straw is going to get more than his share."

In an effort to put a crimp in the Oklahoma straw, the Kansas Supreme Court last month ruled that the Northern Natural Gas Co., whose pipelines carry gas from all sections of the Hugoton field, must pump equally from all their wells. Not only would the ruling mean another $5 million to $10 million annually for well owners in the Sunflower State, but it would stop what Kansans claim is

a steady seepage of their reserves into the Oklahoma portion of the field.

UNFAIR: Alf Landon, the normally calm-speaking ex-governor who was the Republican Presidential candidate in 1936, showed just how riled up Kansans are about what they consider a misuse of the state's natural resources. "To me, corporations which persist in wasting natural gas . . . and persist in violating the rights of Kansas landowners and producers, all to the detriment of the best interests of Kansas, have no real sense of responsibility," he said.

Northern Natural Gas Co., arguing that its pumping pattern had been approved by the Federal Power Commission, last week asked the Kansas court to reverse its decision.

Whatever the outcome, it seemed certain that the border feud was headed for the U. S. Supreme Court. As chairman Harold Freeman of the Oklahoma Corporation Commission put it: "The Kansas Supreme Court doesn't have jurisdiction in this situation. More than 90 per cent of the gas leaving the Oklahoma portion of the Hugoton field goes into interstate commerce."

APPENDIX D

No. 42,127

NORTHERN NATURAL GAS COMPANY,
Appellant,

vs.

STATE CORPORATION COMMISSION,
Appellee.

Syllabus by the Court

Gas—*Order of Corporation Commission—Requiring Ratable Taking by All Purchasing Companies.*

Pursuant to the provisions of G.S. 1949, 55-703, as amended, the State Corporation Commission has power to issue an order promulgating a rule to regulate the production of natural gas in such a manner as to require all gas purchasing companies to take natural gas ratably from all wells within the same common source of supply to which each is connected.

Appeal from Finney district court: ROLAND H. TATE, judge. Opinion filed June 10, 1961. Affirmed.

Mark H. Adams, II, of Wichita, argued the cause, and *Mark H. Adams, Charles E. Jones, William I. Robinson, J. Ashford Manka, Clifford L. Malone, John S. Seeber* and *Floyd E. Jensen*, all of Wichita, and *Lawrence I. Shaw, F. Vinson Roach* and *Patrick J. McCarthy*, all of Omaha, Nebraska, and *Ray H. Calihan, Logan N. Green, Daniel R. Hopkins* and *Ray H. Calihan, Jr.*, all of Garden City, were with him on the briefs for the appellant.

Charles C. McCarter, General Counsel, argued the cause, and *S. F. Fleeker*, Assistant General Counsel, was with him on the briefs for the appellee.

The opinion of the court was delivered by

SCHROEDER, J.: This is a judicial review action to determine the validity of a State Corporation Commission order and rule directed to gas purchasers, rather than gas producers, requiring them to purchase ratably from all wells within the common source of supply to which each purchaser is connected.

The petition for judicial review was filed on February 19, 1960, by Northern Natural Gas Company (hereinafter referred to as Northern or appellant) in the district court of Finney County, Kansas. Thereafter on the 8th day of April, 1960, the district court having heard argument of counsel entered its judgment confirming the Commission's order of February 3, 1960, and the Commission's promulgation of Rule 82-2-219 thereby. The lower court found the rule and order of the State Corporation Commission to be lawful, valid and reasonable.

After the trial court overruled Northern's motion for a new trial, appeal was duly perfected to this court.

In a companion case, *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. , P.2d ....., No. 42,128, decided this date, Northern was directed by the State Corporation Commission to show cause why it should not take ratably from the wells to which it was connected in the Hugoton Field in Kansas. As a result of proceedings therein Northern was directed by an order of the Commission "to take gas ratably from its connections in the Kansas Hugoton Gas Field." As a part of such order the Commission retained jurisdiction of the subject matter and the parties for the purpose of entering such

further order or orders and promulgating and implementing such further rules and regulations as from time to time it deemed proper.

In Northern's petition for rehearing before the Commission, filed November 6, 1959, Northern contended, among other things, the order directed against it was unlawful in that:

> "(d) It purports to amend said Commission's Basic Proration Order for the Hugoton Gas Field insofar only as it affects one (Northern Natural Gas Company) of the seven principal purchasers of gas therein and in a proceeding not noticed to any party as being a proceeding for the amendment of said Basic Proration Order all in violation of the due process clause of the Constitution of the United States."

Northern's petition for rehearing in the "show cause" case was denied and judicial review proceedings concerning the Commission's order dated October 7, 1959, were filed in the district court of Finney County, Kansas, now on appeal in the Supreme Court as Case No. 42,128, heretofore noted as the companion case.

The Commission, in apparent recognition of Northern's objection heretofore quoted, sought to bolster its position in the case against Northern, which arose from circumstances applying only to that company, and on November 12, 1959, on its own motion ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. In issuing such order the Commission found:

> "1. That G.S. 1949, 55-703, as amended, imposes the following duty on this Commission:

"'The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation . . .'

"2. Evidence presented to the Commission indicates that some companies have been and are producing certain wells at higher rates than other wells in the same common source of supply; that this disparity in rates of production has resulted in the accumulation of sizable underages by many wells while others are producing their current allowables; that such situation, if permitted to continue, would violate correlative rights, and the statutory provision above set forth.

"3. That in effectuating its statutory duty in the premises, an investigation should be instituted and a public hearing held thereon for the purpose of considering the adoption of a Rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected."

Pursuant to such findings the Commission ordered:

". . . That an investigation be and it is hereby instituted herein for the purpose of considering the adoption of a Rule to require companies to take gas ratably from all wells to which they are connected in the same common source of supply."

Notice was duly published on December 5, 1959, in the Topeka Daily Capital and a copy of such notice was mailed to all interested parties. Pursuant thereto a hearing was conducted in which the interested parties entered an appearance to present evidence and arguments on the matter.

The Commission, recognizing that it was prompted to conduct the instant proceedings by its docket in the matter of Northern to show cause (Docket No. 60,740-C), in which considerable evidence was taken, ordered the testimony and exhibits in Docket No. 60,740-C incorporated and made a part of the record. Therefore, the facts upon which the rule was promulgated in the instant case are in all material respects identical and present the same issues as the companion "show cause" case.

As a result of the hearing the Commission found pursuant to its duty under G.S. 1949, 55-703, as amended, that it was necessary to promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which each is connected, and by its order dated February 3, 1960, adopted Rule 82-2-219, which reads:

"Ratable Production of Gas from Common Source of Supply.

> "In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959, Supp. 55-703; Effective February 8, 1960)."

In promulgating such rule the Commission found it met the mandate of the statute and enabled the Commission "to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected."

The Commission's general rules and regulations for the conservation of crude oil and natural gas were amended by adding Rule 82-2-219, and the Commission directed that its order and rule be filed with the Revisor of Statutes on February 8, 1960, at which date it was to be published and become official.

The contentions of the appellant are presented in its brief by what it denominates "Questions Involved." They are as follows:

"I.

"Said order and the rule promulgated thereby, approved by the trial court, and each of the findings of fact therein purporting to be in support thereof are not supported by substantial, competent, relevant evidence, and are unauthorized by and contrary to the Kansas Statutes dealing with the production and conservation of natural gas, the basic proration order for the Kansas Hugoton Gas Field and Commission's state-wide gas conservation rules and regulations.

"II.

"Said order and the rule promulgated thereby as approved by the trial court are arbitrary, unreasonable and discriminatory, have no relation to proration or conservation of gas, burden interstate commerce and take appellant's property and contract rights all in violation of the Commerce Clause, the Contract Clause and the Fourteenth Amendment to the Federal Constitution, and the Kansas Bill of Rights, Sections One, Two and Eighteen, and Section Seventeen, Article Two of the Kansas Constitution.

"III.

"Said order and the rule promulgated thereby as approved by the Court under the evidence as applied

to appellant violates the provisions of the Natural Gas Act (15 USCA, 717 et seq.) and invades the jurisdiction of the Federal Power Commission thereunder."

The foregoing contentions are identical with those advanced by Northern in the companion "show cause" case, No. 42,128, where they have been considered and answered by the court upholding the power of the Kansas Corporation Commission to regulate the production of natural gas in such a manner as to require Northern to take gas ratably from all gas wells in the Kansas Hugoton Gas Field to which its lines were connected.

It follows that if the Commission has authority pursuant to G.S. 1949, 55-703, as amended, (now G.S. 1959 Supp., 55-703) to lawfully issue such order with respect to one company, *a fortiori*, the Commission may lawfully promulgate and adopt a rule requiring all gas purchasing companies to take natural gas ratably from all wells within the same common source of supply to which each is connected.

We therefore hold Rule No. 82-2-219 and the order promulgating it are valid and lawfully adopted pursuant to the power conferred upon the State Corporation Commission by the provisions of G.S. 1949, 55-703, as amended.

The judgment of the lower court is affirmed.

Schroeder, J., dissents.

APPENDIX E

(Omitting Formal Parts.)

Order

Now on this 7th day of October, 1959, the above-entitled matter comes before the Commission for further consideration and final disposition. The Commission, (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) having examined the record, exhibits, files and briefs of counsel, and being fully advised in the premises, finds:

1. That Northern Natural Gas Company is not taking ratably from its connections in the Kansas Hugoton Gas Field which is a common source of supply.

2. That Northern Natural Gas Company purchases part of its gas from Republic Natural Gas Company under a contract which shall be designated as the "Republic A" contract. That this "Republic A" contract requires Northern Natural Gas Company to take certain quantities of gas or pay for it even if not taken. That this "Republic A" contract has a further provision making it subject to all valid legislation and all valid orders, rules, and regulations of duly constituted authorities having jurisdiction.

3. That the wells dedicated by Republic Natural Gas Company to the fulfillment of this "Republic A" contract have been produced at a much greater rate (percentage of allowables) than other wells connected to the Northern Natural Gas Company system. That the disparity in rates of production has been so great that many wells have ac-

cumulated sizeable underages while the wells producing under the "Republic A" contract are producing the current allowable and some are overproduced. That this is not ratable taking from a common source of supply.

4. That under the Gas Conservation Laws of the State of Kansas, G.S. 1949, 55-703, the Commission is given the duty and power to "so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. . . :" This is also reflected in the Basic Order for the Hugoton Field.

5. That the right to enter into private contracts can not be used as a means to circumvent lawful orders of the Commission or valid laws passed by the Legislature. Therefore the fact that Northern Natural Gas Company may be contractually bound to take a certain quantity of gas from certain wells is not binding on the Commission in its duty to regulate the production of gas from the entire field.

6. That Northern Natural Gas Company should be ordered to take gas ratably from its connections in the Kansas Hugoton Gas Field.

It Is, Therefore, by the Commission Ordered: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

By the Commission It So Ordered.

APPENDIX F

(Omitting Formal Parts.)

Order

Now on this 3rd day of February, 1960, the above-entitled matter comes on for consideration and determination by the State Corporation Commission, hereinafter referred to as the Commission. The Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) having heard the evidence and examined the files and records, and thereby being fully advised in the premises, finds:

1. That on November 12, 1959, the Commission, upon its own motion, ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. That notice of the time and place of said investigation and hearing was published on December 5, 1959, in the Topeka Daily Capital, and that a copy of such notice was mailed to all interested parties. Pursuant to notice, a public hearing was held on December 17, 1959, at the Lassen Hotel, Wichita, Kansas. Appearances were as follows:

Lewis M. Poe and Stuart Carter, representing Colorado Interstate Gas Company;

Stuart R. Carter, representing Sinclair Oil and Gas Company;

Alfred O. Holl and P. K. Smith, representing Cities Service Oil Company;

Ralph R. Brock, representing Northern Pump Company; and W. L. Hartman;

Richard Jones, representing Republic Natural Gas Company;

Milo M. Unruh, representing Kansas-Colorado Utilities, Inc.;

Norton Standaven and Charles Lindberg, representing Pan-American Petroleum Corporation;

O. R. Stites, representing Cities Service Gas Company;

Jeff A. Robertson and C. C. Linley, representing Panhandle Eastern Pipe Line Company;

A. E. Kramer and Dale Stucky, representing Southwest Kansas Royalty Owners Association;

George W. Selinger, representing Skelly Oil Company;

Mark H. Adams, Mark H. Adams, II, and Jack C. Osborne, representing Northern Natural Gas Company;

W. P. Wesley, representing Western Natural Gas Company;

J. L. Higday, representing Kansas Power and Light Company;

J. Robert Wilson and John Townsend, representing the Commission.

The hearing was adjourned for the purpose of receiving and disseminating proposals, until January 21, 1960, at which time the hearing reconvened. Appearances in addition to those entered at the hearing of December 17, 1959, were as follows:

Stanford Smith, representing Cities Service Oil Company;

Homer Penn, representing Republic Natural Gas Company;

Richard Jones, representing Superior Oil Company, a California corporation;

Milo M. Unruh, representing Platean Natural Gas Company;

Richard Jones and William R. Loar, representing Sunray Mid-Continent Oil Company;

Ferd Evans, representing J. M. Huber Corporation;

Donald Mitchell, representing Atlantic Refining Company;

Daniel R. Hopkins, representing Hugoton Production Company;

W. P. Wesley, representing Columbian Fuel Corporation; and

Charles Lindberg, representing Mobil Oil Company, a division of Socony-Mobil Oil Company, Inc.

2. That G.S. 1949, 55,703, as amended, imposes the following duty on this Commission:

"The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *"

3. That for the purpose of facilitating such regulation, and thereby accomplishing the duty contemplated by the statute, it is necessary that the Commission promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which they are connected.

4. That the Commission's staff and other parties have submitted proposals at the hearings, and subsequent thereto, which have been considered by the Commission.

5. That Exhibit "A", designated as Rule 82-2-219, meets the mandate of the statute and will enable the Commission to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected; and that the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas should be amended by adopting the proposed Rule as contained in Exhibit "A", and that said proposal should be designated Rule 82-2-219.

6. That Rule 82-2-219 is of statewide application and should therefore be filed with the Revisor of Statutes on February 8, 1960. This order and Rule 82-2-219, which is attached hereto as Exhibit "A" and made a part hereof, should be served upon all parties affected by this rule by first class United States mail. Further notice should be given by publishing this order including Rule 82-2-219 in the official state paper, on February 8, 1960, and this rule shall become effective on February 8, 1960.

It Is, Therefore, by the Commission Ordered: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960.

And It Is Further Ordered: That this order and said rule, duly certified, be served upon all parties to be affected by first class United States mail and that further notice be given by publishing this order including Rule 82-2-219 in the Official State Paper, on February 8, 1960.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such

Richard Jones, representing Superior Oil Company, a California corporation;

Milo M. Unruh, representing Plateau Natural Gas Company;

Richard Jones and William R. Loar, representing Sunray Mid-Continent Oil Company;

Ferd Evans, representing J. M. Huber Corporation;

Donald Mitchell, representing Atlantic Refining Company;

Daniel R. Hopkins, representing Hugoton Production Company;

W. P. Wesley, representing Columbian Fuel Corporation; and

Charles Lindberg, representing Mobil Oil Company, a division of Socony-Mobil Oil Company, Inc.

2. That G.S. 1949, 55,703, as amended, imposes the following duty on this Commission:

"The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *"

3. That for the purpose of facilitating such regulation, and thereby accomplishing the duty contemplated by the statute, it is necessary that the Commission promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which they are connected.

4. That the Commission's staff and other parties have submitted proposals at the hearings, and subsequent thereto, which have been considered by the Commission.

5. That Exhibit "A", designated as Rule 82-2-219, meets the mandate of the statute and will enable the Commission to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected; and that the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas should be amended by adopting the proposed Rule as contained in Exhibit "A", and that said proposal should be designated Rule 82-2-219.

6. That Rule 82-2-219 is of statewide application and should therefore be filed with the Revisor of Statutes on February 8, 1960. This order and Rule 82-2-219, which is attached hereto as Exhibit "A" and made a part hereof, should be served upon all parties affected by this rule by first class United States mail. Further notice should be given by publishing this order including Rule 82-2-219 in the official state paper, on February 8, 1960, and this rule shall become effective on February 8, 1960.

It Is, Therefore, by the Commission Ordered: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960.

And It Is Further Ordered: That this order and said rule, duly certified, be served upon all parties to be affected by first class United States mail and that further notice be given by publishing this order including Rule 82-2-219 in the Official State Paper, on February 8, 1960.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such

further order or orders, and promulgating and implementing such further rules and regulations as from time to time it may deem proper."

By the Commission It Is So Ordered.

Wiles, Chm.; Beatty, Com.; Byrd, Com

EXHIBIT "A".

Rule 82-2-219

RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY.

In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959, Supp. 55-703; Effective February 8, 1960).

APPENDIX G

Pertinent Portions of the Natural Gas Act

Sec. 1 NECESSITY FOR REGULATION OF NATURAL GAS COMPANIES.

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Sec. 4 RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES.

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the

jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change

or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus

made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Sec. 5 FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall

have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Sec. 7 CONSTRUCTION, EXTENSION, OR ABANDONMENT OF FACILITIES; CERTIFICATE OF CONVENIENCE AND NECESSITY; CONDEMNATION PROCEEDINGS.

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that

no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience

and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and

willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the lo-

cation of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Sec. 16 ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS.

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and

regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

APPENDIX H

Federal Power Commission Regulations under Natural Gas Act

Filing by producers and gatherers of natural gas which are also natural gas companies

154.91 APPLICABILITY.

(a) *Definitions.* (1) An "independent producer" as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

* * *

(b) *Filings by operators signatory to a gas sales contract.* (1) Where the operator (i) of a natural gas producing property (not a producer selling pursuant to a percentage formula under paragraph (e) of this section), or (ii) of a plant processing natural gas and located in or near the production area of the gas it processes is a signatory party to a contract for the sale of the gas produced or processed, the operator shall make all the filings required under §§ 154.92 (rate schedules), 154.94 (changes in rate schedules), or 157.23 (applications for certificates) of all signatories for such sale, as well as for the sale and delivery (according to the terms of the contract) of the gas of non-signatory coowners. Notwithstanding this requirement for filings by operators, a coowner who is a signatory party to a contract of sale of natural gas may, but he need not, make his own filings under §§ 154.92,

154.94 and 157.23 in addition to the filings required of the operators.

(2) As a part of his application for a certificate of public convenience and necessity, the operator shall file: (i) a copy of the contract or contracts for the sale of gas in interstate commerce for resale; (ii) the names and percentum of ownership of coowners whose interest in production is to be delivered to the purchaser under the terms of such contract or contracts; and (iii) a copy of the sales authorization from, or operating agreement with, any nonsignatory coowners whose gas is so to be delivered.

(3) The operator, either at the close of each calendar year or at the end of each 12-month period following the date of initial filing, shall submit a statement listing any changes in the ownership of working interests, producers, or plant ownership occurring subsequent to the filing of a prior statement hereunder.

154.92 FILING OF RATE SCHEDULES BY INDEPENDENT PRODUCER.

(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an

interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

* * *

154.93 RATE SCHEDULE DEFINED.

For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

Provided, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions

shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) Provisions that change a price to a specific amount at a definite date; and

(3) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (subparagraph (2) of this paragraph), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question.

154.94 CHANGES IN RATE SCHEDULES.

(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this section.

* * *

154.97 CANCELLATION OR TERMINATION.

When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place,

the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of parties to whom the notice has been mailed.

157.5 PURPOSE AND INTENT OF RULES.

(a) Applications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested. Some applications may relate to facilities which are additions to existing facilities or facilities of such character that an abbreviated application may be justified under the provisions of § 157.7. However, every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project as well as its effect upon applicant's present and future operations.

(b) Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.

(c) This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant.

157.23 APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY INDEPENDENT PRODUCER.

* * *

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 7 copies) pursuant to sections 157.24 through 157.27. The Commission reserves the right to request additional copies. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by Exhibit A. Where the economic feasibility of a new pipe line or important extension or expansion of an existing pipe line depends upon proof of an adequate gas supply, all related applications necessary to effectuate the service shall be filed within time to enable the Commission to consider all related matters concurrently.

157.30 ABANDONMENT OF SERVICE.

No independent producer as herein defined shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the

available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. *Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 62

NORTHERN NATURAL GAS COMPANY, A CORPORATION, APPELLANT

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of Kansas in Case No. 42,128 is reported at 188 Kan. 355, 362 P. 2d 599 (R. 157), and its opinion denying rehearing at 188 Kan. 624, 364 P. 2d 668 (R. 187). The District Court of Finney County, Kansas, rendered no opinion. Its judgment is set forth at R. 112. The order of the Kansas Corporation Commission (R. 99) is not reported.

The opinion of the Supreme Court of Kansas in Case No. 42,127 is reported at 188 Kan. 351, 362 P.

2d 609 (R. 36). It rendered no opinion on rehearing. The District Court of Finney County, Kansas, rendered no opinion. Its judgment is set forth at R. 26. The order and rule of the Kansas Corporation Comission (R. 14–17) are not reported.

JURISDICTION

The Supreme Court of Kansas affirmed the judgment of the District Court in both cases on June 10, 1961. It denied rehearing on August 31, 1961, in No. 42,128 and on September 19, 1961, in No. 42,127. Notice of appeal in both cases was filed in the Supreme Court of Kansas on November 17, 1961, and the Jurisdictional Statement was filed in this Court on January 12, 1962. This Court noted probable jurisdiction on May 28, 1962 (370 U.S. 901). The jurisdiction of this Court is based on 28 U.S.C. § 1257 (2).

QUESTION PRESENTED

Whether orders of the Kansas Corporation Commission, directing each interstate pipeline to purchase gas at a uniform rate from all wells in the same reservoir to which it is connected, constitute a forbidden regulation of sales in interstate commerce, if the consequence is to force Kansas gas upon the interstate market and to cause pipelines to incur contract penalties which must be borne, in the form of increased rates, by the ultimate consumers of natural gas in other states.

STATUTES INVOLVED

The provisions of the United States Constitution, the Natural Gas Act, and the Kansas General Stat-

utes which bear upon the issues of this case are set forth in the brief of appellant Northern Natural Gas Company.

STATEMENT

Appellant Northern Natural Gas Company (hereinafter called "Northern") is a corporation engaged in the purchase, transmission, and sale of natural gas[1] in interstate commerce for ultimate public consumption (R. 18–19),[2] and is therefore a "natural-gas company" within the meaning of the Natural Gas Act. 15 U.S.C. 717a, 52 Stat. 821. One of its most important sources of supply is the Kansas portion of the Hugoton natural gas field, where its pipeline is connected to more than 1,100 wells (R. 75–76) at locations ranging from the northernmost to the southernmost ends of the Kansas portion, a distance of more than 80 miles. In this case Northern attacks orders of the Kansas Corporation Commission requiring it to purchase gas "ratably" from all wells to which it is connected in the Hugoton field—*i.e.*, to purchase from each well the same percentage of the allowable production of that well as it purchases from every other well. The purpose and significance of these orders can only be understood in the larger context of the Kansas Commission's continuing regulatory policy in the Hugoton field, a brief description of which follows.

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[1] Although a wholly owned subsidiary of Northern's is engaged in the production of gas, Northern itself is not a producer.

[2] "R." refers to the Transcript of Record in this Court.

1. THE BACKGROUND FACTS—REGULATION OF PRODUCTION IN THE KANSAS HUGOTON FIELD

The Hugoton natural gas field is a single reservoir, or "source of supply," covering parts of Oklahoma and Texas, as well as Kansas. The Kansas portion of the field (hereinafter called the "Kansas Hugoton" field) extends about 85 miles northward from the Oklahoma border, not far from the western boundary of Kansas, and is about 60 miles wide. Because the Hugoton field is a single reservoir, a well or group of wells located in any region of it is a potential drain upon all the other wells in the field. The movement of gas within a common reservoir is governed by pressure differentials, the gas migrating from areas of higher pressure to areas of lower pressure. If gas is removed from a reservoir through a given well, the pressure level in the vicinity of that well is reduced, and the remaining gas tends to flow toward the area of reduced pressure until the presure level of the entire pool has again become uniform. Thus, it is theoretically possible to extract from a single group of wells all the recoverable natural gas in the common source of supply, with resultant exhaustion of the unproductive or less productive wells in the field (see R. 51–52).

Each of the three States in which the Hugoton field lies has a commission which is authorized by State law to regulate the production of oil and gas within the respective State boundaries, in the interest of conserving the minerals and protecting the correlative rights of the owners of the overlying land. The Kansas State Corporation Commission, as part of its conservation responsibility, is empowered, when-

ever the available production of gas from a common source exceeds the market demand for that gas, to prorate to each producer the amount that it is allowed to withdraw each month. The maximum permissible production for each well is termed its "allowable." The Commission's power to establish the allowable for each well is designed "to prevent the inequitable or unfair taking from such common source of supply by any person, firm, or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor or against any producer in any such common source of supply." In establishing the allowables, the Commission is authorized to consider "acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent." Further, "in determining the market demand for gas from a common source of supply," the Commission must consider, among other things, "the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand." Kansas Gen. Stat. 55–703 (1959 Supp.).

In March 1956, the Kansas Commission issued an order directing purchasers of natural gas in the Kansas Hugoton field to show cause why they should not be required to take gas ratably from the various wells in that field. The extensive public hearings which followed culminated in a report and order issued Janu-

ary 22, 1958[3] (hereinafter called "the 1958 order"), the effect of which was to change the method of proration which the Commission had consistently followed during the period 1944–1956.[4] Prior to 1956 it had been the Commission's practice to equate "market demand"—by far the most important factor in computing allowables—with the nominations by purchasers of the amounts they expected to take from the Hugoton field during the ensuing six-month period. See *Twenty-Fourth Biennial Report*, p. 216; App. C, *infra*, p. 43.

In its 1958 order, however, the Commission ruled that "market demand" would not be determined solely by reference to purchaser nominations. Noting that the Oklahoma portion of the reservoir was being depleted approximately twice as fast as the Kansas portion, and the Texas portion at an even higher rate (with consequent drainage to those States from Kansas), it decided that "market demand" would be determined in the future not only on the basis of pur-

[3] The Report and Order is published in the *Twenty-Fourth Biennial Report of the Kansas State Corporation Commission*, pp. 214–221, and is reproduced in full in Appendix C, *infra*, pp. 37–54. It will hereafter be cited as "*Twenty-Fourth Biennial Report*", and page references will be given both to the published version and to Appendix C.

[4] During the course of the hearings—from April 1956 through November 1957—the Commission issued monthly proration orders and reports, which it denominated "Interim Orders." These orders fixed allowables for the current month, but were not determinative of any of the issues pending in the proration proceeding. See *Twenty-Fourth Biennial Report*, pp. 216–217; App. C, *infra*, pp. 41–42.

chaser nominations, but also on the basis of other factors, including:[5]

> (1) Takes from other sources of supply to which the purchasers are connected;
>
> (2) The total markets for natural gas of all purchasers from the Kansas-Hugoton Field; the rate of increase therein compared to the rate of increase in the takes from the Kansas portion of the Hugoton Field.

The 1958 order made certain other changes in the pre-1956 proration formula. Until 1956, current allowables for the Kansas Hugoton field were arrived at by taking "market demand," adding to it the "cancelled underages"[6] of the preceding month, and then subtracting from the total the amount of underproduction (excess of allowables over production) recorded for the preceding month. By means of this self-correcting mechanism, any reduction in total purchases from the field would call forth a corresponding reduction in the following month's allowables, thereby maintaining the intended relationship between market demand and allowable production. In the 1958 order the Commission criticized the pre-1956 formula on the ground that it enabled the pipeline companies, by adjusting the level of their monthly purchases, to exercise virtually complete control over the level of the allowables. Accordingly, it modified the formula by providing that in future the "net allowables" for the

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[5] *Twenty-Fourth Biennial Report*, p. 218; App. C, *infra*, p. 44.

[6] Wells which do not produce their allowables in a particular month are allowed to carry over this "underage" and make it up in subsequent periods, until the total accumulated underage exceeds a certain level, after which the excess is cancelled.

Hugoton field would be computed by taking the "current allowables" (market demand plus the cancelled underages of the preceding month) and *adding*, rather than subtracting, the preceding month's net underproduction.[7]

That the purpose of the 1958 proration order was, in large part, to increase Kansas production at the expense of Oklahoma is evidenced by the following excerpt from the concurring opinion of Chairman Beatty (*id.* at pp. 218–220; App. C, *infra*, pp. 49–51):

> Intervenors have urged us to continue the practice of setting high monthly allowables which was started by the Commission in April, 1956. They have asked us to increase the allowables 25% more even though the Commission since April, 1956, has been allowing somewhat more than the market actually absorbed. This benefited pipe line companies in need of gas, usually those overproduced. It was coercive on those who did not have proportional markets, those usually underproduced. It has not been effective so far, but if and when it has the intended effect of forcing higher takes, it will allow the producers and royalty owners to convert their minerals into cash more quickly. The only visible results in the last nineteen months, however, have been no increase in takes and a gradually mounting net underage. The net allowable is now 52 million M.c.f. higher than the amount that will be actually taken and marketed this month, but if it is carried for awhile,

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[7] *Twenty-Fourth Biennial Report*, pp. 219–220; App. C, *infra*, pp. 37–47.

the pipe line companies may find a market for it.

* * * * *

I am most heartily in favor of Kansas resources being harvested and marketed by Kansas people and Kansas industries, rather than by Oklahomans, and my sympathies are with the Kansas royalty owners, some of whom have had to sell their birthright to the pipe line companies for a mess of pottage (as low as 3¢ to 8¢ per M.c.f.) and are now having the pottage rationed to them in small spoonfuls, but whether we, a conservation commission, should try to force the sale and depletion of our natural gas at today's low prices, raises another question. Gas is a most desirable fuel. America's reserves of natural gas are being depleted one hundred times faster than our coal reserves. Aside from the question of our authority and jurisdiction to execute such a program under present conservation statutes, such a program may, in retrospect, prove to be very unwise, considering the welfare of the state as a whole.

Despite Chairman Beatty's recognition that the mere raising of the allowables had "not been effective so far" in "forcing higher takes," the Commission continued to consider factors other than the purchasers' nominations in determining "market demand." Thus, in its order of October 8, 1958,[8] determining market demand for proration purposes, the Commission found that the pipelines' nominations

[8] Copies of this and other pertinent orders of the Kansas Commission discussed, *infra*, are being filed with the clerk of this Court.

totalled 238,634,540 Mcf for the six months ending March 31, 1959, and that this total was lower than the nominations for the same periods of the two preceding years. It found that "the consumptive market of the purchasing pipeline companies has increased" since March 31, 1958, and noted evidence that

> * * * if the five largest purchasers (purchasing pipeline companies) would take gas from the Kansas Hugoton Gas Field at the same rate based on comparative gas reserves as they now do from the other sources to which they are connected, the Kansas Hugoton Gas Field's fair share of the markets would be 676,904,000 M.c.f. for a twelve months' period. This indicates that the market demand for the next six months would be approximately 430,000,000 M.c.f. * * *

The Commission ultimately fixed total current allowables for the six-month period at 255,000,000 Mcf, or more than 16 million Mcf above the pipelines' estimates.

In the next order, dated April 22, 1959, fixing allowables for the six months from April 1 to September 30 of that year, the Kansas Commission again found that the pipelines' nominations of 169,451,200 Mcf did not reflect the "fair market demand" for the Kansas Hugoton field. Evidence showed that, if the five largest purchasers took gas from that field at the same rate relative to reserves as from their other connections, the field's share would be 241,519,000 Mcf. Evidence also showed that the Kansas Hugoton reserves of the four leading purchasers amounted to 44% of their total reserves, but that these companies were supplying only 23% of their over-all markets with Kansas

Hugoton gas. Although evidence as to drainage of gas from Kansas into Oklahoma was conflicting and inconclusive, the total allowables were fixed at 175,000,000 Mcf, or 5,548,800 Mcf above the pipelines' nominations.

In the next order, dated November 10, 1959, fixing allowables for the six months to March 31, 1960, the Commission declared:

> Nominations and runs are often controlled or influenced by contracts between the producers and purchasers. These contracts do not necessarily bear any relationship to the market demand for gas from the Kansas Hugoton Gas Field or any gas field, and they are not binding upon the Commission in carrying out its regulatory duties.

In each subsequent proration order, the "market demand" has been based on considerations similar to those stated in the orders discussed above, and each time allowables have exceeded the nominations of the pipelines. Each order has contained findings that the Commission is not bound by the contractual relationships between producers and purchasers; that the Kansas Hugoton field is not getting its fair share of the purchasers' markets; and that purchases have been lower, in proportion to reserves, in Kansas Hugoton than elsewhere.

The Kansas method of determining allowables is in striking contrast to that employed in the Oklahoma portion of the Hugoton field, where allowables have regularly been kept closely in line with production. The comparative figures are:

Year ended Sept. 30:	Hugoton Gas Field Production as % of allowables[*] Kansas	Oklahoma
1957	94.0	99.2
1958	89.5	98.3
1959	84.4	101.5
1960	91.7	100.8
1961	91.3	97.3

Thus, while the Oklahoma allowables have been linked tightly to the pipelines' demand for gas from the Oklahoma portion of the field, the Kansas Hugoton allowables reflect in part the Kansas Commission's estimate of the State's "fair share" of the markets of the pipelines.

2. THE FACTS OF THIS CASE

In 1945, Northern entered into a gas purchase contract with Republic Natural Gas Company (referred to as the "Republic 'A' Contract") under which it buys the gas from 144 wells owned by Republic in the Kansas Hugoton field (R. 69–70). Under this contract, Northern agreed to buy, and Republic to sell, 60 percent of the gas required by Northern in serving certain specified portions of Iowa and Nebraska, known as "The Omaha District." The aggregate volume of gas was to be not less than 12.5 billion nor more than 36.5 billion cubic feet per annum (R. 71–72).

The Kansas Hugoton gas field was placed under proration by the State Corporation Commission of Kansas, effective April 1, 1944 (R. 74). Although

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[*] Percentages computed from figures for production and allowables for Kansas and Oklahoma, respectively, shown by their respective State Corporation Commission monthly Gas Proration Orders and Reports for the years indicated.

at first the allowables assigned to the Republic "A" wells were high enough to permit Republic to deliver to Northern 60 percent of Northern's requirements for serving the Omaha District, those requirements had so increased by 1947 that the contract commitment exceeded allowables (R. 74). In 1952, in *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708, the Kansas Supreme Court determined that Northern should arrange its purchases from the Republic "A" wells in such a way that at the end of each contract accounting year it would have taken the full legal allowables assigned to those wells by orders of the Kansas Commission.

Meanwhile, Northern had contracted for additional supplies of gas from other acreage in the Kansas Hugoton field. Each of these gas purchase contracts requires Northern to purchase and receive gas from the wells covered thereby ratably with all other wells connected to its pipeline in the Kansas Hugoton field except the Republic "A" wells, which are expressly excluded from the ratable-take provisions in the other contracts (R. 76–78).

During the period from April 1944, until the spring of 1958, Northern's purchases from the Republic "A" wells were at or near the allowable level, as were the purchases from wells of its other suppliers in the Kansas Hugoton field (R. 83–84). In the spring of 1958, however, when the Kansas Commission changed its method of fixing allowables, the take from the Republic "A" wells remained reasonably close to the allowable level of production, while the take from the other

wells, in contrast, declined sharply.[10] A witness for Northern attributed this development to two factors: (1) the allowables granted by the State Commission to the field as a whole far exceeded total field production; and (2) the company had not received from the Federal Power Commission certificates of public convenience and necessity permitting as rapid an expansion of its system as had been expected (R. 84–85). When the total of allowable production is fixed substantially higher than the market, only the Republic "A" wells (from which Northern is contractually obligated, subject to valid proration orders, to purchase 60% of its Omaha District requirements) produce current allowables, while the other wells connected with Northern (with which it has no such contractual minimum-take obligation) ratably produce the balance of the demand (R. 87). The level of Northern's markets at the time of the hearings did not make it necessary for it to take the full current allowables from all its connections in the Hugoton field (R. 88).

On May 27, 1959, the Kansas Commission issued a show cause order directing that a hearing be held to determine whether Northern should be required to take ratably from all the wells connected to it in the Hugoton field. The order (R. 66–67) recited that evidence indicated that Northern had not been taking the full allowables, and had not taken ratably from its

[10] R. 83–84. Thus, in 1959, as shown, *infra*, p. 26, Northern's purchases from the Republic "A" wells amounted to 86.19% of allowables, while its takes from the other connected wells totaled only 53.61% of allowables.

connecting wells. The order of October 7, 1959, which resulted from these hearings (R. 99–101; App. A, *infra*, pp. 32–33), directed it to take ratably from all its connected wells in the Kansas Hugoton field. It is this order which was the subject of Case No. 42,128 in the Kansas Supreme Court.

The record on which this order was based was incorporated into the record of a hearing held January 21, 1960 (R. 7–13) and, with other evidence, resulted in promulgation of the rule, effective February 8, 1960, which is the subject of Case No. 42,127. That rule requires each purchaser from a common source of supply to take gas ratably in proportion to the allowables from all wells with which it is connected (R. 17–18; App. B, *infra*, pp. 34–36).

3. PROCEEDINGS IN THE COURTS BELOW

On appeal, both the trial court and the Supreme Court of Kansas sustained the Commission's order and rule. A divided Supreme Court upheld the order directed to Northern (Case No. 42,128) on the ground that it served to protect the owners of the "underproduced" wells, who were suffering drainage to the Republic "A" wells; that it is proper for the State Commission to require purchasers from a common source of gas supply to take ratably from all wells with which they are connected; and that the order imposes no burden on interstate commerce since it does not require Northern to take any particular amount of gas, but only to take ratably from all its connections (R. 157–166). The court also upheld the rule directed to all gas pur-

chasers (Case No. 42,127), stating that if the Commission could lawfully issue a ratable-take order addressed to one company, *a fortiori* it could make a general rule having the same effect on all companies (R. 36–41).

In his dissent in Case No. 42,128 (R. 166–175), Schroeder, J., pointed out that the entire difficulty arose from the discrepancy existing since 1958 between the total market demand and the total of the allowables, and that if allowables had in fact been fixed at the level indicated by the market, the rate of take would be the same from the Republic "A" wells as from Northern's other connections in the field. The Kansas gas conservation statute, he said, was intended to operate on the producer, not the purchaser, and the Commission exceeded its statutory authority in adopting the order.

In denying Northern's motion for rehearing, the court handed down an opinion further explaining its decision (R. 187–189). This case, it said, in no way involves the price of gas; the only important thing is that the purchaser take the gas so that it may be produced, and that he take ratably from all wells to which he is connected. The opinion ends with the following paragraphs (R. 188–189):

> Northern has in this case cast some reflection upon the increase of allowables in 1958 by the Kansas Commission. The record contains no facts concerning this action of the Commission. But we must assume that the Commission believed that the market was sufficient to warrant the increase. Moreover, if we are justified in taking judicial notice of

facts, we must also assume that the Kansas allowables were not greater than the Oklahoma allowables. And we notice that it was generally thought to be a fact that drainage of gas was occurring from the Kansas Hugoton field to that part of the field in Oklahoma.

Thus, in 1958, the Commission may have been, in a roundabout way, endeavoring to set up ratable taking as between Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells.

Of course, none of this is involved in the record of the case before us. However, we may direct attention to the news story on page 54, in *Newsweek* for July 10, 1961, entitled *Natural Gas: Two Straws.* It is there noted that the Hugoton field covers some 4.1 million acres in Kansas, Oklahoma and Texas; that most of the estimated 300 trillion cubic feet of gas in the field lies under Kansas soil, but that Oklahoma supplies the major share of the 2 million cubic feet pumped daily northward through the pipe lines.

The motion for rehearing is denied.

ARGUMENT

1. In response to evidence that producers in the Oklahoma and Texas portions of the Hugoton field were enjoying a larger share of the interstate market than producers in the Kansas portion, and that Oklahoma wells were draining Kansas wells, the Kansas Commission initiated a proceeding in early 1956 to correct the imbalance. By a series of proration orders, culminating in the order of January 22, 1958, App. C., *infra,* pp. 37–54, it changed its traditional

method of fixing "allowables" for the Hugoton field. The allowable assigned to each well for any given six-month period was no longer to be its appropriate share of the total estimated market demand for the field, as adjusted monthly by actual experience, but rather its appropriate share of a larger total which represented the Kansas Commission's views of what Kansas' share of the interstate market *ought* to be. In attempting, however, to increase total Kansas production by assuming the increase would occur, the Commission inevitably promoted inequalities among Kansas producers themselves, for while the new proration method enabled some wells—*i.e.*, those previously straining at the limits of their allowables, to produce more gas, it had no impact whatever on those wells which, even under the old system of proration, were already fully satisfying the requirements of the pipelines to which they were connected. In any event, as Chairman Beatty of the Kansas Commission observed (*supra*, p. 8), the new method proved ineffective in "forcing higher takes" and thus securing to Kansas producers a larger share of the interstate market. This, of course, was hardly surprising so long as no pipeline was under any compulsion to take all or any prescribed portion of the allowables assigned to its connected wells.

In October 1959 and February 1960 the Kansas Commission, by the orders here in issue, required Northern (and subsequently every other pipeline) to take ratably from all wells supplying it in the same field. In light of the regulatory history summarized in the Statement, *supra*, pp. 5–12, we have interpreted these orders as an effort to exert leverage upon inter-

state pipeline companies to increase their takes from Kansas wells. Specifically, we have assumed that the orders leave intact Northern's contract obligation to take (or at least pay for) a minimum volume of gas from the Republic "A" wells; otherwise, the requirement of ratable-taking might be satisfied through a reduction of Northern's purchases from Republic (coupled, perhaps, with an equivalent increase in takes from Oklahoma and Texas producers), to the detriment of the total production of the State of Kansas. On this assumption, *i.e.*, that the minimum-take provision of the Republic "A" contract remains in force, Northern, in order to comply with the regulation, must adopt one of two courses, either of which would result in increased revenues for Kansas producers and royalty owners (and also, as we show, *infra*, pp. 25–30, increased rates for the ultimate consumers in other States). On the one hand, Northern might raise its takes from its other Kansas suppliers to the level at which it is obliged to purchase from the Republic "A" wells, making corresponding reductions in its takes from Oklahoma and Texas producers. Operating in this way, the regulation here in question would be equivalent to a general minimum-take order, requiring each pipeline to take from all its suppliers at the highest rate which it is required by contract to take from any of them. Alternatively, Northern might maintain its existing volume of purchases from the Kansas Hugoton field, reducing its takes from the Republic "A" wells and increasing its takes from its other connections. In that event, the increase in revenues to Northern's "other" suppliers would not be

offset by any reduction in revenues to Republic, for Northern would still be obligated to pay for the contract volumes *not* taken.

These consequences, of course, would flow from the Kansas orders only on the assumption that the minimum-take provision of the Republic "A" contract remains in force. In its reply to the government's memorandum filed at the petition stage (pp. 4–5) appellee insists, however, that under Kansas law the minimum-take provision is *pro tanto* modified by the Kansas Commission's orders, so that Northern is free to comply with the regulation by decreasing its takes from Republic without violating the contract or incurring penalties thereunder. Moreover, appellee attributes such a holding to the Kansas Supreme Court, pointing out that the court referred to language in the Republic "A" contract by which that contract was made subject "to all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction." (R. 164).

We do not urge that this Court resolve disputed questions of State law which lurk in this case. We point out, however, that as a matter of construction, there is, at the least, a serious question whether the orders have the effect ascribed to them by the appellee, since (a) neither of the orders purports, on its face, to reform the minimum-take provisions of private contracts; (b) the Kansas Commission has no express statutory authority to modify contracts; and (c) there is no unavoidable conflict between the orders and the minimum-take provision of the contract from

which one might infer the latter's invalidity. And while the Kansas Supreme Court did advert to the above-quoted language of the Republic "A" contract, it can scarcely be deemed to have held or even "indicated," as appellee suggests, that Northern was relieved of its minimum-take obligations, either by the regulation, *ex proprio vigore*, or by the terms of the contract itself.

We acknowledge that if it were authoritatively decided, as a matter of State law, that the Kansas orders release Northern from its minimum-take commitment, then the regulation would have no significant impact upon the rates paid by the consumers,[21] or the volumes produced and sold by producers, in other States. For Northern would then be free to comply with the orders by reducing its takes from the Republic "A" wells and increasing its takes from its other connections, without altering the total quantities purchased from Kansas suppliers and without incurring any liability for gas not taken. In that event, despite the fact that the Kansas regulation is in terms addressed to interstate pipeline companies rather than to Kansas producers, we would not urge that it so impinged upon matters of national, as opposed to local, concern, or that it so interfered with the regulatory functions and purposes of the Federal Power Commission un-

[21] Indeed, it appears that the rates paid by Northern under the Republic "A" contract were higher than those paid under other gas purchase contracts in the Kansas Hugoton field. See App. E, *infra*, p. 56. See also discussion at pp. 28–29, *infra*.

der the Natural Gas Act, as to require its invalidation under the supremacy clause.[12]

If the Court agrees with our suggestion that the validity of the Kansas orders may turn upon the subsidiary question whether, under State law, Northern (and pipelines similarly situated) are relieved of their contractual obligations to take minimum quantities of Kansas gas, it may wish to pretermit federal questions in this case until the disputed issue of State law has been resolved by the Kansas courts. In that event, we believe that the appropriate procedure would be to vacate the judgments below and to remand the cause to the Kansas Supreme Court for further proceedings.[13] See *Aquilino* v. *United States*, 363 U.S. 509, 515–516.

2. If the Kansas orders do *not*, as a matter of State law, relieve Northern of its contractual minimum-take

[12] In our earlier memorandum (pp. 2–3), we questioned whether the Kansas orders were reasonably related to the prevention of drainage and the protection of the correlative rights of all producers taking from the common reservoir. This was particularly relevant from the standpoint of deciding whether the purpose and effect of the Kansas orders were to force increased quantities of Kansas gas into interstate channels. But if Northern is in fact under no economic compulsion to take these increased quantities, that concern is removed.

[13] *Republic Natural Gas Co.* v. *Northern Natural Gas Co.*, Nos. 4165 and 4235, now pending in the District Court of Stevens County, Kansas, is an action for damages brought by Republic against Northern for its failure to purchase the minimum volumes of gas prescribed by the "Republic 'A' Contract." Under a remand from this Court, the Kansas Supreme Court would be free to resolve the State-law question noted above in the instant proceedings or to hold these proceedings on its docket pending resolution of the question in the contract litigation involving Republic and Northern.

obligations, the decision below should be reversed. The essence of our contention is that the orders, on that premise, would force Kansas gas into interstate channels and impose burdens, in the form of increased rates, upon consumers in other States.

Appellee argues that since the Natural Gas Act was not intended to deprive the States of any regulatory jurisdiction which was recognized as theirs at the time of the Act's passage in 1938, the true test of the validity of the Kansas Commission's actions is whether they would have been valid exercises of State power before Congress entered the field. It concedes, however, that the applicable constitutional standards are not those which now govern the scope of State power under the Commerce Clause but, rather, the somewhat stricter ones which were thought to prevail at the time the Natural Gas Act was passed.[14]

Assuming, for purposes of this case, that appellee's understanding of the applicable legal standard is correct, we suggest that it makes no difference whether the question of the validity of the Kansas regulation is approached by way of the supremacy clause ("Are the Kansas orders compatible with the legislative scheme of the Natural Gas Act?") or by way of the commerce clause in its 1938 dimensions ("Could Kansas have undertaken this regulation prior to the enactment of the Natural Gas Act?"). In either case the answer is the same. If the Kansas orders do not contemplate relief of Northern from its

[14] See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 685; *Cities Service Gas Co.* v. *State Corp. Commission of Kansas*, 355 U.S. 391; *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44.

contractual obligations, their manifest purpose and effect are to regulate the purchases of interstate pipeline companies in such a way as to force Kansas gas upon the interstate market. Such regulation would invade an area which Congress has entrusted to the exclusive regulation of the Federal Power Commission; it would also go well beyond the States' historic power to adopt legitimate measures to conserve natural resources and protect the correlative rights of producers in a common source of supply. Thus, Mr. Justice Frankfurter, concurring in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 686, discerned in Section 1(b) the following legislative intent:

> "However, since sales for resale, or so-called 'wholesale sales,' in interstate commerce are not local in character and are constitutionally not subject to State regulation, see *Missouri* v. *Kansas Gas Co.,* 265 U.S. 298, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U.S. 83, the basic purpose of the legislation is to occupy this field in which the States may not act."

In determining whether the action of the Kansas Commission is a regulation of "production" or a regulation of sales in interstate commerce, it is surely relevant that the orders are, on their face, addressed to interstate pipeline companies, not local producers; that any criminal penalties which may be assessed for non-compliance will be assessed against the pipelines, not the producers; and that while the orders seek to assure an equitable distribution of interstate sales among wells attached to the same line, they would freely tolerate, and indeed enforce, unequal rates of production as between wells attached to different

pipelines in the common reservoir. We recognize, however, that these considerations, though relevant, are not decisive. The natural gas industry differs from other industries in that the production of the commodity (*i.e.*, the withdrawal of gas from the well) and its movement into interstate channels constitute one and the same physical operation. Thus, a regulation limiting the volume a pipeline may purchase from a given well would be tantamount in effect to a limitation upon the production of that well. In order, therefore, to determine whether the present orders fall within the "production and gathering" exemption of Section 1(b), it is necessary to look beyond their nominal subject matter and attempt to discern the degree and nature of their impact upon interstate commerce.

Measured by their practical consequences, the Kansas orders (still assuming that they provide no relief from contract obligations) are plainly a regulation of sales for resale in interstate commerce. For in order to comply with the regulation, Northern, it seems clear, would be forced to adopt one of two alternatives, either of which would inevitably result in higher rates to the ultimate consumers in other States.

(a) As one alternative, Northern might comply with the order by increasing its takes from other Kansas wells to the level of its purchases from the Republic "A" wells. In 1959—the last full year before the *general* rateable-take order here involved became effective—Northern's takes from all its connections in the Kansas Hugoton field were 84,229,577 Mcf, or 61.27% of the allowable production of those wells. Its takes from the Republic "A" wells were 21,941,199

Mcf, or 86.19% of allowables, while its takes from the other connected wells were 62,288,378 Mcf, or 55.61% of allowables.[15] For Northern to increase its "other" Kansas Hugoton purchases to the Republic "A" level of 86.19% of allowables, it would have to take 33,956,951 Mcf more than it did.[16] At the average price of gas from those wells (11.593587¢ per Mcf),[17] Northern would be spending some $4,000,000 extra per annum, contributing that much additional revenue to Kansas producers.

Having raised its takes from Kansas producers by 33,956,951 Mcf, Northern would have to reduce its takes outside Kansas by an equal amount, *i.e.*, from 379,250,577 Mcf to 345,293,626 Mcf.[18] A pipeline seeks to purchase what it needs; except in limited amounts, and for limited periods, it cannot accept gas for which it has no market. The reduction of Northern's gas takes outside of Kansas Hugoton, however, would not be accompanied by a proportionate reduction in the cost of that gas, for Northern's takes outside of Kansas Hugoton are sub-

[15] See App. D, *infra*, p. 55.

[16] The 33,956,960 Mcf figure is derived by subtracting Northern's actual 1959 Kansas Hugoton purchases (83,512,434 Mcf, as reported in Northern's 1959 Form 2 Report to the Federal Power Commission, which varies slightly from the 84,229,577 Mcf, *supra*, derived from Kansas Commission proration orders) from the amount it would have taken at the rate of 86.19% from all Kansas Hugoton wells (117,469,385 Mcf). These figures are shown in App. F, *infra*, pp. 59–60.

[17] The derivation of this figure is shown in App. F, *infra*, p. 58.

[18] For derivation of these figures see Appendix F, *infra*, pp. 58–59.

ject to minimum-take provisions which prevent reductions in volume from being reflected in reductions in cost. According to representations made by Northern [19] in a certificate proceeding, Docket No. CP62-85, now pending before the Federal Power Commission, its actual purchases outside of Kansas Hugoton in 1959 were only slightly above the minimum volume required to be taken under its purchase contracts. Those representations show that the volume required to be taken outside of Kansas Hugoton in 1960 was 389,764,236 Mcf,[20] as compared to the 379,250,577 actually taken in 1959. Thus, Northern would be compelled, under its out-of-Kansas contracts, to pay approximately the same dollar amount for its reduced takes there. It follows that if the result of the regulation here in issue is to cause Northern to increase its purchases in Kansas, Northern would be saddled with extra costs overall. These extra costs for purchased gas would be part of Northern's cost of service and as such would ultimately fall upon the consumers, who would underwrite the $4 million increase in revenue to Kansas producers.

(b) Northern's other alternative would be to comply with the Kansas orders by reducing its takes from the Republic "A" wells and increasing its takes from the other wells, without altering its overall rate

[19] See Appendix G, *infra*, pp. 61-68.

[20] This figure represents the total of the minimum volumes required to be taken from all fields to which Northern is connected (511,522,007 Mcf), as shown in Appendix G, *infra*, p. 66) minus the required minimum volume *imputed* to the Kansas Hugoton field (121,757,771 Mcf) by Appendix G, *infra*, p. 66.

of take for the Kansas Hugoton field as a whole. That course of action, however, would likewise result in higher revenues for Kansas producers at the expense of the ultimate consumer since, by virtue of the minimum-take provision in the Republic "A" contract, the reduction in volumes purchased from the Republic "A" wells would not lead to any reduction in costs. Northern—and, in turn, its customers—would have to pay for gas not taken.

The impact of the minimum-take provision upon Northern's rates can be illustrated by the actual figures for 1959. In that year, as we have seen, *supra*, pp. 25–26, Northern purchased 21,941,199 Mcf from the Republic "A" wells, or 86.19% of the full allowables, and hence the required contract minimum, for those wells. In 1959 the effective rate under the Republic "A" contract, on file with the Federal Power Commission as Republic's FPC Gas Rate Schedule No. 8, was 16.75 cents per Mcf. Thus, if Northern had been required to pay only for the gas which it actually purchased, it would have paid Republic a total of $3,674,951 (21,941,199 Mcf × 16.75 cents). However, Northern's annual report to the Federal Power Commission (FPC Form 2, 1959), submitted pursuant to Section 260.1, Regulations under the Natural Gas Act (18 C.F.R. 260.1), shows[21] that in 1959 it paid $4,272,421,[22] or approximately 19.5 cents per Mcf, for

[21] The pertinent portion of that report is reproduced as Appendix E, *infra*, p. 56. Data with respect to the Republic "A" contract are shown on the last line of the page.

[22] We are now advised by Northern that the full amount of the $4,272,421 shown in its report has not actually been "paid" to Republic. Instead, that portion which is attributable to gas required by contract to be taken, but not actually taken, was

the gas purchased under the Republic "A" contract. This dollar figure closely approximates the amount Northern *would* have had to pay at the official filed rate of 16.75¢ per Mcf, if it had taken the full allowables—*i.e.*, the full contract minimum—of 25,456,127 Mcf from the Republic "A" wells, rather than merely 86.19% thereof.[23] In short, although Northern took somewhat less, it was required to pay for the full Republic "A" contract minimum, with the result that the cost of the gas it did take increased from the filed rate of 16.75 cents to 19.5 cents per Mcf.

If the Kansas ratable-take orders had been in effect throughout the year 1959, and if Northern had sought to comply by purchasing gas from each of its connected wells in the Kansas Hugoton field at its overall average rate of 61.27% (see, *supra*, p. 25), its purchases from the Republic "A" wells would have been reduced, and its purchases from the other Kansas Hugoton wells increased, by 6,471,417 Mcf.[24] Since Northern, notwithstanding its reduced take, would have had to pay for the minimum Republic "A" contract volumes, its total costs would have been increased by the amount paid for the additional volume of gas

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accrued on the Company's books as a contingent liability, pending resolution of the controversy between the parties as to the effect of the Kansas orders upon minimum-take obligations in the contract, see p. 22, *supra*, fn. 13. Since the figures are here being used only for purposes of illustration, it is immaterial whether Northern actually paid or merely accrued the indicated amount.

[23] The price for 25,456,127 Mcf at 16.75 cents per Mcf would be $4,263,901.

[24] Computed by subtracting the adjusted Republic "A" purchases (15,465,434 Mcf) from the actual purchases (21,936,851 Mcf), as shown in Appendix F, *infra*, pp. 58, 60.

taken from the other Kansas Hugoton wells. This increase in cost to Northern, and ultimately to Northern's consumers, would have been $750,269.[25]

In short, whether Northern proceeds under alternative (a) or (b) (or a combination of the two), the consequence is the same: Northern will be obliged to take or to pay for more Kansas gas than it can use. A scheme of regulation which carries with it the practical consequence that interstate pipelines must take increased quantities of gas from a State (or pay contractual penalties) cannot be regarded as a conservation measure or as a regulation within the boundaries of the "production and gathering" exemption set forth in Section 1(b) of the Natural Gas Act. Rather, it is a regulation of interstate commerce—one which stands on no better footing than the Kansas minimum price regulation which this Court has already held invalid. *Cities Service Gas Co.* v. *State Corp. Commission of Kansas,* 355 U.S. 391.

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[25] The derivation of this figure is shown in Appendix F, *infra*, pp. 58–60, particularly p. 60.

CONCLUSION

We submit, for the reasons set forth above, that the judgments of the Supreme Court of Kansas should be vacated and the cause remanded to that court for determination, in accordance with appropriate State procedures, of the unresolved issues of State law.

Respectfully submitted,

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OCTOBER 1962.

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APPENDIX A

The Kansas Corporation Commission order of October 7, 1959, under review in Case No. 42,128 below is as follows (caption omitted):

ORDER

Now on this 7th day of October, 1959, the above-entitled matter comes before the Commission for further consideration and final disposition. The Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners), having examined the record, exhibits, files and briefs of counsel, and being fully advised in the premises, finds:

1. That Northern Natural Gas Company is not taking ratably from its connections in the Kansas Hugoton Gas Field which is a common source of supply.

2. That Northern Natural Gas Company purchases part of its gas from Republic Natural Gas Company under a contract which shall be designated as the "Republic A" contract. That this "Republic A" contract requires Northern Natural Gas Company to take certain quantities of gas or pay for it even if not taken. That this "Republic A" contract has a further provision making it subject to all valid legislation and all valid orders, rules, and regulations of duly constituted authorities having jurisdiction.

3. That the wells dedicated by Republic Natural Gas Company to the fulfillment of this "Republic A" contract have been produced at a much greater rate (percentage of allowables) than other wells connected to the Northern Natural Gas Company system. That the dis-

parity in rates of production has been so great that many wells have accumulated sizeable underages while the wells producing under the "Republic A" contract are producing the current allowable and some are overproduced. That this is not ratable taking from a common source of supply.

4. That under the Gas Conservation Laws of the State of Kansas, G.S. 1949, 55-703, the Commission is given the duty and power to "so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *" This is also reflected in the Basic Order for the Hugoton Field.

5. That the right to enter into private contracts can not be used as a means to circumvent lawful orders of the Commission or valid laws passed by the Legislature. Therefore the fact that Northern Natural Gas Company may be contractually bound to take a certain quantity of gas from certain wells is not binding on the Commission in its duty to regulate the production of gas from the entire field.

6. That Northern Natural Gas Company should be ordered to take gas ratably from its connections in the Kansas Hugoton Gas Field.

It Is, Therefore, by the Commission Ordered: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

By the Commission, It Is So Ordered.

[SEAL] RAYMOND B. HARVEY, *Secretary.*

APPENDIX B

The Kansas Corporation Commission order of February 3, 1960 and the rule appended thereto as Exhibit "A", which are under review in Case No. 42,127 are as follows (caption omitted):

ORDER

Now on this 3rd day of February, 1960, the above-entitled matter comes on for consideration and determination by the State Corporation Commission, hereinafter referred to as the Commission. The Commission (Harry G. Wiles, Chairman, Marion Beatty and Richard C. Byrd, Commissioners) having heard the evidence and examined the files and records, and thereby being fully advised in the premises, finds:

1. That on November 12, 1959, the Commission upon its own motion, ordered an investigation and hearing for the purpose of considering the adoption of a rule to require that companies take gas ratably from all wells in the same common source of supply to which they are connected. That notice of the time and place of said investigation and hearing was published on December 5, 1959, in the Topeka Daily Capital, and that a copy of such notice was mailed to all interested parties. Pursuant to notice, a public hearing was held on December 17, 1959, at the Lassen Hotel, Wichita, Kansas. Appearances were as follows:

(Appearances Omitted)

The hearing was adjourned for the purpose of receiving and disseminating proposals, until January 21, 1960, at which time the hearing reconvened. Appearances in addition to those

entered at the hearing of December 17, 1959, were as follows:

(Appearances Omitted)

2. That G.S. 1949, 55,703, as amended, imposes the following duty on this Commission:

"The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation. * * *"

3. That for the purpose of facilitating such regulation, and thereby accomplishing the duty contemplated by the statute, it is necessary that the Commission promulgate and adopt a rule requiring all companies to take natural gas ratably from all wells within the same common source of supply to which they are connected.

4. That the Commission's staff and other parties have submitted proposals at the hearings, and subsequent thereto, which have been considered by the Commission.

5. That Exhibit "A", designated as Rule 82–2–219, meets the mandate of the statute and will enable the Commission to regulate production of natural gas in such a manner as to require companies to produce ratably from all wells within the same common source of supply to which they are connected; and that the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas should be amended by adopting the proposed Rule as contained in Exhibit "A", and that said proposal should be designated Rule 82–2–219.

6. That Rule 82–2–219 is of statewide application and should therefore be filed with the Revisor of Statutes on February 8, 1960. This order and Rule 82–2–219, which is attached hereto as Exhibit "A" and made a part hereof, should be served upon all parties affected by this rule by first class United States mail. Further notice should be given by publishing this

order including Rule 82-2-219 in the official state paper, on February 8, 1960, and this rule shall become effective on February 8, 1960.

It Is, Therefore, by the Commission Ordered: That rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960.

And It Is Further Ordered: That this order and said rule, duly certified, be served upon all parties to be affected by first class United States mail and that further notice be given by publishing this order including Rule 82-2-219 in the Official State Paper, on February 8, 1960.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders, and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

By the Commission, It Is So Ordered.

WILES, *Chm.*
BEATTY, *Com.*
BYRD, *Com.*

APPENDIX C

Docket No. 51,488-C (C-4916). Conservation Division.

In the matter of Cities Service Gas Company, Colorado Interstate Gas Company, Hugoton Production Company, Kansas-Colorado Utilities, Inc., Kansas-Nebraska Natural Gas Company, Inc., Northern Natural Gas Company, Panhandle Eastern Pipe Line Company, Quinque Oil and Gas Production Company, United Carbon Company, Shallow Water Refining Company, to show cause.

REPORT AND ORDER ISSUED JANUARY 22, 1958

By The Commission:

1. This proceeding was initiated by the Commission by an order issued March 16, 1956, directed to purchasers of natural gas produced in the Kansas Hugoton Gas Field to show cause why they should not be required to take ratably from the various wells in the Hugoton Gas Field in the State of Kansas in order to prevent discrimination, uncompensated cognizable drainage, inequitable taking and waste as contemplated by the gas conservation statutes of the state.

2. A public hearing was duly held on March 30, 1958, at the Allis Hotel, Wichita, Kansas, at which appearances were entered on behalf of Cities Service Gas Company, Northern Natural Gas Company, Shallow Water Refining Company, Colorado Interstate Gas Company, Kansas-Nebraska Natural Gas Company, Inc., Panhandle Eastern Pipe Line Company, Kansas-Colorado Utilities, Inc., Hugoton Production

Company, Quinque Oil and Gas Production Company, United Carbon Company, Inc. (Maryland), United Carbon Company, Southwest Kansas Royalty Owners Association, intervenor, and the Commission. That at said hearing, this docket was consolidated for hearing purposes with Docket No. 51,342–C (C–4888) the market demand hearing for the Hugoton Gas Field for the proration period from April 1 to September 30, 1956; subsequently those dockets were consolidated for hearing purposes with subsequent market demand hearing dockets Nos. 53,042–C (C–5171), 54,220–C (C–5454) and 55,705–C (C–5792), all being heard on a common record. Further hearings were held on April 27, May 24, June 28, July 20, and August 30, 1956, April 23 and August 27 and 28, 1957, at which evidence and arguments were presented, at the close of which the matter was taken under advisement by the Commission.

3. Extensive public hearings have been held in these dockets. The transcript of proceedings and exhibits is voluminous. Pertinent facts established by the history of the field, Commission records and the transcript of proceedings herein will be briefly stated.

4. The question presented for determination in these proceedings is twofold; whether migration of gas may be occurring or is likely to occur from the Kansas portion of the Hugoton Gas Field to other portions of the field, remedial steps which may be and should be taken by the Commission to prevent loss of this valuable natural resource to Kansas and Kansas owners, and what corrective measures may be and should be taken by the Commission in performance of its statutory duty to prevent waste, protect correlative rights, and prevent unreasonable discrimination and inequitable withdrawals of gas from said field.

Evidence and Findings of Fact

5. The Hugoton Gas Field of Kansas, located in nine southwestern counties of the state, is a part of a large natural gas reservoir which extends south across the Oklahoma Panhandle and into Texas. The largest portion of the field is in Kansas. Gas is found in porous limestone and dolomite in the Hugoton Gas Field. The thickness of the gas producing horizons varies considerably and they are not uniform as to porosity or permeability.

6. Early development in Kansas, prior to proration, was in an area approximately 20 miles north of the Kansas-Oklahoma state line and in Oklahoma in an area from 10 to 25 miles south of said state line. As a result of this early development, areas of reduced pressures or "pressure sinks" were created surrounding the early wells. Later the areas of early development were connected by production so that by 1956 there were relatively few undrilled well locations.

7. The movement of gas within a common reservoir is governed by pressure differentials, the gas migrates from the areas of higher pressure to the areas of lower pressure. In its virgin state, the pressure within a common source of supply is the same, or practically the same, at all points. When gas is produced from a well, the pressure within the reservoir is reduced in the vicinity of the well bore. This causes gas in the formation to expand into the well. When a producing well is shut in, the pressure in the formation in the vicinity of the well will build up from that existing during production and this again tends to equalize the pressure within the formation and demonstrates that the continued migration of gas from high pressure to low pressure areas is occurring. Gas migrates within the reservoir from developed leases having higher pressure to other developed leases having lower pres-

sures in accordance with the same principles which govern the movement of gas from the formation into the several well bores. If the migration or drainage of gas across property lines is not equalized by counter-drainage, the developed leases so drained will not ultimately produce approximately the amount of gas underlying them. The extent of the movement of gas between developed leases depends upon the magnitude of variation in pressure existing as between developed leases, the areas contained in such leases and the amounts of gas withdrawn. (Hugoton Proration Order, paragraph *d.*)

Pressure History

8. The virgin shut-in wellhead pressure of the entire Hugoton reservoir was approximately 435 p.s.i.g. A study of the closed-in wellhead pressures by years reveals that by 1948 the arithmetic average closed-in wellhead pressure in the Kansas portion of the field was 385 pounds, while the corresponding figure for the Oklahoma portion of the field was 384 pounds, and the average pressure in the Texas portion of the field was 378 pounds. Until 1948, the pressure decline in the three states was about equal. But by 1954 the average wellhead pressure of Kansas wells was 366 pounds, a decrease of 19 pounds from 1948. At the same time the average Oklahoma wellhead pressure had declined to 340 pounds, a decrease of 44 pounds over the same period of time, while the Texas pressure had been reduced to 339 pounds, a decrease of 39 pounds. By 1956 the average wellhead pressure in Texas had decreased to 288 pounds, in Oklahoma to 316 pounds, while the Kansas average pressure was still as high as 356 pounds.

9. Pressure declines result from production of gas reserves and are also a measure of the rate of deple-

tion of gas reserves. The gas reserves in the Oklahoma portion of the reservoir are being depleted approximately twice as fast as the gas reserves in the Kansas portion of the reservoir and the gas reserves in the Texas portion of the reservoir are being depleted at an even higher rate. Evidence further indicates that if the present trend continues, the arithmetic average closed-in wellhead pressure p.s.i.g. for wells one mile each side of the Oklahoma-Kansas state line will be as follows:

	Kansas	Oklahoma
1958	322	315
1959	317	306
1960	312	298
1961	307	290
1962	301	282

10. Evidence presented at the hearings on these dockets indicates that at the present time pressure differentials do exist between developed leases in the southern portion of the Kansas Hugoton Field and leases in the northern portion of the Oklahoma Field. While the actual amount of drainage from the Kansas portion of the field to the Oklahoma portion of the field is not at the time cognizable, the evidence shows that this drainage will become cognizable within a period of three or four years unless the takes of gas from the Kansas portion of the field are increased in sufficient amounts to stop the increasing difference between the pressures in the Kansas field and the Oklahoma field.

Interim Order

11. During the course of the hearings herein, the Commission has issued its monthly proration orders and reports for the Hugoton Gas Field, denominated Interim Orders. Each of these orders issued for the month of April, 1956, and subsequent months through November, 1957, has contained the following finding:

"That an interim order should be entered herein determining a schedule of production allowable for wells in the Hugoton Gas Field for the month of (current month), but determinative of no other issue in the matter referred to above, now pending before the Commission."

12. In view of this clear and unequivocal language contained in the orders themselves, we interpret these orders to be final orders so far as they determined allowables for each month. As stated in the orders, they determined the monthly allowables, but were determinative of no other issue pending in the dockets. No one of the Interim Orders issued by the Commission from April, 1956, through October, 1957, has been contested.

Market Demand Factors To Be Considered

13. This Commission, as an arm of the State, has the power, in the interest of conservation, to enter such orders as may be necessary to prevent waste of natural resources and to protect correlative rights. The statute is clear that the Commission shall so regulate the taking of gas from any and all common sources of supply within the state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation, and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. The legislature said specifically that the Commission in promulgating rules, regulations and formulas to attain such results should take into consideration certain conditions and then added "and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time as may be pertinent." (G.S. 1949, 55-703).

14. From the evidence presented, it is apparent to

the Commission that a determination of market demand based only on nominations reduced the allowables to a point where Kansas cannot produce the gas that could otherwise be produced in compliance with the basic order. It is necessary, therefore, that the Commission evolve a method of determining market demand and calculating allowables which will give effect to all the actual facts and conditions existing in the field rather than use solely the pipe line purchasers' nominations as the market demand.

15. In order for the Commission to properly administer and regulate the production of natural gas as required by statute the Commission must periodically determine the market demand for gas from the field. In addition to the general statutory duty imposed in this regard, the Hugoton Proration Order, in paragraph "o" thereof, made the following finding:

> "o. At such time and place as the Commission shall fix, the Commission will, after notice, conduct a hearing to determine the market demand for natural gas from said field for the next six succeeding proration periods, or for such other period of time as the Commission shall prescribe, and at said hearing may determine any other questions which may properly and legally come before the Commission for consideration thereat, and a new schedule of production allowable for the wells in said field, based upon the determination made as a result of such hearing, shall be prepared and promulgated for the ensuing proration periods."

16. A review of the Commission's past allowable orders and the evidence presented in these dockets discloses that heretofore the nominations by the purchasers from the Hugoton Field have been used and considered by the Commission as the market demand for the field. However, the evidence presented in

these dockets discloses that in many instances the aforesaid nominations did not approximate the market demand. Therefore the Commission finds that it is necessary, in determining the market demand for natural gas from the Hugoton Field, to consider, in addition to the nominations by the purchasers, the following factors:

(1) Takes from other sources of supply to which the purchasers are connected.

(2) The total markets for natural gas of all purchasers from the Kansas Hugoton Field; the rate of increase therein compared to the rate of increase in the takes from the Kansas portion of the Hugoton Field.

(3) Takes from other sources of supply in Kansas.

(4) Any other factors, conditions and/or circumstances that would aid the Commission in establishing the market demand.

Calculation of Allowables

17. The market demand figure, once obtained, heretofore was used to determine the current allowable to be assigned by the Commission to the field. Prior to May, 1956, the current allowable was determined by taking the market demand, first adding thereto the canceled underages for the previous month and then subtracting therefrom the amount of underproduction or adding thereto the amount of overproduction for the previous month. The result of the use of this method was that in actuality the runs or takes from the field controlled the amount of the current allowable; the control of the market demand and current allow..ble was entirely and exclusively in the hands of the purchaser pipe line companies, and not in the Commission.

18. The Commission, in an effort to take control, deviated from the formula of determining current allowables and for August, 1956, and subsequent months has fixed current allowables by taking the market demand figures, still based exclusively on nominations of the purchasers, and adding thereto the canceled underproduction for the previous month. Actually, except for the consideration of a small amount of canceled underproduction, the market demand, based solely on the nominations of the purchasers, was the current allowable for the field. The current allowable for each well was calculated in accordance with the provisions of paragraph (1) of the Basic Order for the Hugoton Gas Field. Each well continued to carry in addition to its current allowable such underproduction or overproduction as may have accrued to it. The result was the net allowable for each well. The sum total of the net allowables of the wells therein represented the net allowable for the entire field.

19. To restate this formula, allowables in the future will be determined as follows: Consider the factors as discussed in paragraph 16 above and arrive at the market demand figure; add to it the canceled underages, and the result will be the current monthly allowable. (This is the amount that is ratably apportioned to the wells each month.) To ascertain the net allowable for the field as a whole, add the total net underage or subtract the total net overage. The resulting figure is the field total net allowable on that date.

The field as a whole is never exactly in balance. It is to be expected that for some periods of time it will have a total net underage and for other periods of time it will have a total net overage.

20. The Commission finds that in order to prevent waste, protect correlative rights and effectively prorate gas from this field, it will determine market de-

mand as set out in paragraph 16 above and will continue to determine current and net allowables as set out in paragraph 19.

Balancing Period

21. A study of the history of the monthly proration orders for the Hugoton Gas Field from April, 1956, through November 1957, leads the Commission to the conclusion that their effect has been to put the field somewhat out of balance, and the Commission must take steps to restore balance to that field eventually or periodically. In order to accomplish this, the Commission recognized that it must prevent the excessive overproduction or excessive underproduction of the wells within the same common source of supply. Therefore the Commission, in Docket No. C-164, held a public hearing concerned with the advisability of amending paragraph "p" of the Hugoton Basic Proration Order and as a result of this hearing has restored a balancing period requiring the producers in the Hugoton Field to bring each well into balance at stated times as set out therein. The principle of the balancing period has been approved by this Commission numerous times in the past and the Supreme Court of the State of Kansas has at times in the past approved this principle.

22. Periodic balancing has the merit of preventing any wells from remaining excessively overproduced or excessively underproduced. It helps to enforce ratable takings as between all wells in the field. It also has the effect of encouraging producers and pipe line companies to produce and sell their total underages to companies in need of gas and encourage overproduced companies to buy from others to fill their needs.

23. In conformance with the views heretofore expressed, it is, therefore, ordered:

(1) That future determinations of market demand for natural gas from the Kansas Hugoton Field will give effect to the following factors, in addition to nominations of purchasers:

A. Takes from other sources of supply to which the purchasers are connected.

B. The total markets for natural gas of all purchasers from the Kansas Hugoton Field; the rate of increase therein compared to the rate of increase in the takes from the Kansas portion of the Hugoton Field.

C. Takes from other sources of supply in Kansas.

D. Any other factors, conditions and/or circumstances that would aid the Commission in establishing the market demand.

(2) That future monthly net allowables for natural gas for the Kansas Hugoton Field will be determined by adding canceled underages to the market demand figure as calculated above, and to that total add the total net underage or subtract the total net overage. (See paragraph 19.) The future current monthly allowable to be determined as set out in paragraphs 18 and 19.

(3) The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

(4) That this Report and Order shall take effect on February 1, 1958, and that the Secretary of the Commission shall mail copies thereof to all interested parties.

Marion Beatty, *Chairman,* Specially Concurring; Harry G. Wiles, *Commissioner;* Richard C. Byrd, *Commissioner,* Specially Concurring.

[SEAL] RAYMOND B. HARVEY, *Secretary.*

SPECIALLY CONCURRING OPINION

By Chairman Beatty

In our findings and Memorandum Opinion, we have reached three basic conclusions: They relate to (1) drainage, (2) determination of allowables and (3) balancing period.

(1) *Drainage*

The takes from the Hugoton Field as a whole, and its pressure history, indicate that although the drainage, if any, about which the intervenors complain is negligible at the present time, if the past and present rates of withdrawal from the Kansas portion of the Hugoton Field, as compared with rates of withdrawal from the Oklahoma portion of the Hugoton Field, continue in the future, there will be drainage of gas from the Kansas portion of the field to the Oklahoma portion thereof. We have made no findings or conclusions as to whether this drainage eventually will be moderate, considerable or devastating. The evidence was inconclusive.

The evidence in regard to the pressure pattern and drainage has been an education and I wish to call it to the attention of the Kansas Legislature for whatever remedial action, if any, the Legislature may see fit to take.

I specifically concur in the findings of fact we have made in regard to drainage, paragraphs 7 to 10 inclusive, but I for one, have never been satisfied that the present statutes give to this Commission the necessary power and authority to remedy this interstate situation, if a remedy there be.

(2) *Determination of Allowable*

The Commission has concluded that under the system of setting allowables for the Hugoton Field which

was in effect up until April, 1956, it was the pipe line companies that were in fact setting allowables for the Hugoton Field. The Commission had the practice of accepting pipe line companies' nominations as a starting point and if these proved to be over or under the actual runs, the market demand for the following month was adjusted accordingly so that the runs, which also were wholly controlled by the pipe line companies, actually were determining allowables.

I concur with the decision made herein to take not only nominations but certain other factors into consideration in setting these monthly allowables, as we have discussed in paragraphs 14 to 19, inclusive, above, so that the setting of allowables will henceforth be exercised by the State Corporation Commission rather than the industry to be regulated.

(3) *Balancing Period*

I wish to concur in the restoration of a balancing period as discussed in paragraphs 21 and 22 above. A balancing period was part of the original Basic Order for this field and one is included in most other such basic orders. It acts as a governor and helps to assure that each well will be produced ratably with other wells in the field.

DISCUSSION

Intervenors have urged us to continue the practice of setting high monthly allowables which was started by the Commission in April, 1956. They have asked us to increase the allowables 25% more even though the Commission since April, 1956, has been allowing somewhat more than the market actually absorbed. This benefited pipe line companies in need of gas, usually those over-produced. It was coercive on those who did not have proportional markets, those usually

underproduced. It has not been effective so far, but if and when it has the intended effect of forcing higher takes, it will allow the producers and royalty owners to convert their minerals into cash more quickly. The only visible results in the last nineteen months, however, has been no increase in takes and a gradually mounting net underage. The net allowable is now 52 million M.c.f. higher than the amount that will be actually taken and marketed this month, but if it is carried for awhile, the pipe line companies may find a market for it.

Since my tenure on this Commission, beginning ten months ago, I have been deeply concerned about what is a reasonable net overage or underage for the field and how far the net balance may fluctuate in either direction before the Commission would be obliged to check it. Testimony of the experts indicates that the present 52 million M.c.f. net underage is not a serious imbalance if the field is eventually brought into balance by increased takes or gradually reduced allowables. This was one of the considerations that caused the Commission to reject the request of some of the parties that we start over and recalculate the allowables for every month back through April, 1956.

I wish to point out that neither the Order and Memorandum Opinion unanimously adopted by the Commission nor the formula adopted necessarily commit this Commission to set artificially high allowables, or allowables at a figure which eventually will permit equalization of pressures between Kansas and Oklahoma, or allowables that will permit a program of planned depletion of the field in thirty years or any given number of years.

It is impossible to prorate the field to fit the pace of both those who want less and those who want

more gas. The result has to be somewhere in between and the Commission has some discretion.

If allowables are set high enough, or if high allowables continue long enough, admittedly the result will be to force underproduced pipe line companies to take and dispose of more Kansas gas or suffer cancellation of their underproduced allowables. The higher the allowables, the greater the coercion, the greater the cancellations and the more severe the penalties. I feel that the Commission needs a clearer mandate from the Legislature as its authority to execute this kind of a program for the purpose of forcing up the runs.

I am most heartily in favor of Kansas resources being harvested and marketed by Kansas people and Kansas industries, rather than by Oklahomans, and my sympathies are with the Kansas royalty owners, some of whom have had to sell their birthright to the pipe line companies for a mess of pottage (as low as 3 cents to 8 cents per M.c.f.) and are now having the pottage rationed to them in small spoonfuls, but whether we, a conservation commission, should try to force the sale and depletion of our natural gas at today's low prices, raises another question. Gas is a most desirable fuel. America's reserves of natural gas are being depleted one hundred times faster than our coal reserves. Aside from the question of our authority and jurisdiction to execute such a program under present conservation statutes, such a program may, in retrospect, prove to be very unwise, considering the welfare of the state as a whole.

MARION BEATTY, *Chairman.*

SPECIALLY CONCURRING OPINION

By Commissioner Byrd

I concur with the findings of fact as set forth in the Commission's report and order. I believe that provisions contained in the order relating to the determination of market demand and the factors to be considered in such determination, if realistically considered by the Commission in the future, can and will result in the prevention of drainage and the protection of correlative rights. However, because of the seriousness of the situation that would be presented by the extrapolation of the present rates of pressure decline of the wells in this field along the Oklahoma-Kansas state line, I feel that the Commission is justified at this time in taking more positive steps to prevent this situation from becoming a reality. The evidence presented indicated, and the Commission's report and order so finds, that based on the present rates of withdrawal from the Kansas and Oklahoma portions of the Hugoton Field, the average closed-in wellhead pressure for the wells in Oklahoma along the state line are decreasing and will decrease approximately 9 pounds per year; the wells in Kansas along the state line will decrease approximately 5 pounds per year. If those conditions continue to exist, in 1962 the arithmetic average closed-in wellhead pressure for the wells one mile on each side of the Kansas-Oklahoma state line will be 301 pounds in Kansas and 282 pounds in Oklahoma, a pressure differential of 19 pounds. With this differential in pressure, a serious drainage problem would exist.

The threat of this situation's existing is imminent and has been clearly called to the attention of the Commission. To avoid it, without undue hardships being imposed on the purchasers of gas, immediate

action must be taken. To delay the institution of preventive measures until this situation actually exists disregards the obligations imposed upon the Commission by the Gas Conservation Statute, particularly when we have been put on notice and are aware of the impending situation. The statutes grant this Commission broad powers. Should these powers not be sufficient to cope with this imminent threat of drainage, it is best that we become aware of this statutory deficiency before the drainage situation becomes a reality.

The evidence presented in these dockets shows that the demands for gas of the major gas purchasers in the Kansas Hugoton Field have increased substantially the last ten years. The total sales of gas by these companies has increased disproportionately with their withdrawals of gas in the Kansas Hugoton Field. All industry predictions are that the total demand for natural gas will continue to increase in the future. Based on this evidence, I believe the Commission is justified in determining at this time minimum allowables, based upon past and projected market demands of the gas purchasers, for the next 5 years. These minimum allowables should be determined now so that by the year 1962 the minimum allowables would permit the withdrawal of gas from the Kansas portion of the Hugoton Field at a rate equal to the withdrawal of gas from the Oklahoma portion of the Hugoton Field. In other words, the Commission should now establish a goal, and determine minimum allowables by year for the future, that will bring a halt to the steadily increasing pressure drop at the Kansas-Oklahoma state line by the year 1962.

Such a determination is not only justified by the evidence presented in these dockets, and required of us by the Statutes of Kansas, but would better able

the gas purchasers to adjust their takes of gas from the various sources of supply to which they are connected in order to meet their market requirements. If our goal is to prevent this future drainage situation, and I believe the Commission's order and report adopts that goal, then I believe the industry should be clearly informed of this intention. Accomplishment of that goal should be done in a method or manner least burdensome to the companies.

As I previously stated, I believe that the provisions of the Commission's order can accomplish the goal that is desired; however, the establishment of a planned depletion allowable as set forth above would, in my opinion, be a more effective means of accomplishing this end.

RICHARD C. BYRD, *Commissioner.*

APPENDIX D

NORTHERN NATURAL GAS COMPANY, HUGOTON FIELD ALLOWABLES AND RUNS FOR THE YEAR 1959*

1959	Republic Natural Gas Company "A"		Total	
	Current allowable	Runs	Current allowable	Runs
January	2,674,300	2,409,025	14,062,142	9,225,410
February	2,272,583	2,384,250	11,860,160	8,240,076
March	2,071,806	2,428,374	10,873,950	8,579,291
April	1,998,268	1,922,526	10,503,324	5,800,137
May	1,795,487	928,818	9,503,232	1,558,623
June	1,471,891	1,842,773	7,827,481	2,520,074
July	1,495,754	211,877	7,949,076	1,751,143
August	1,786,101	847,309	9,521,511	3,035,519
September	1,943,493	975,933	10,805,145	5,541,706
October	1,955,636	2,326,789	10,926,706	11,808,080
November	2,803,920	2,525,753	15,701,468	12,855,285
December	3,187,726	2,557,772	17,854,734	13,374,623
Total	25,456,127	21,941,199	137,461,578	84,229,577

F.P.C. CALCULATIONS BASED UPON ABOVE TOTALS

	Allowable	Runs	Percentage of allowable taken by Northern Natural Gas Company
Total:			
Kansas Hugoton	137,461,578	84,229,577	61.27
Republican Natural Gas Co. "A"	25,456,127	21,941,199	86.19
Other Companies	112,005,451	62,288,378	55.61

*Data from Kansas State Corporation Commission, Monthly Proration Orders and Reports.

APPENDIX E

Excerpt (p. 89D) From Report of Northern Natural Gas Company to the Federal Power Commission (FPC Form 2) for 1959.

NORTHERN NATURAL GAS COMPANY

Gas Purchased (Account 745) 1959

Name of vendor (designate associated companies) (a)	Point of receipt (b)	Seller's FPC rate schedule designation (c)	Date of contract (c)	Approx. BTU per cu. ft. (d)	Pressure base (e)	M.C.F. of gas (f)	Amount (g)	Average amount per M.C.F. (cents) (h)
Kansas Hockett System:								
Various Vendors (3 Contracts)	Well Mouth				14.65#	304,469	$45,670	15.0
Kansas Hugoton System:								
Northern Natural Gas Producing Co. (Note 1).	Well Mouth	2	11- 1-52	987	14.65#	25,891,029	2,814,982	11.0
Nathan Appleman, et al	" "	6	10-14-57	735	14.65#	309,283	33,031	11.0
Barlu Oil Corporation	" "	1	11- 1-54	Note 2	14.65#	574,160	63,158	11.0
Barlu Oil Corporation	" "	4	4- 8-57	751	14.65#	618,701	68,057	11.0
Colorado Oil and Gas Corporation	" "	22	7-25-44	957	14.65#	241,578	26,574	11.0
Colorado Oil and Gas Corporation	" "	27	2-21-45	967	14.65#	331,095	36,420	11.0
Cities Service Oil Company	" "	70	9- 9-49	968	14.65#	11,401,253	1,368,109	12.0
Champlin Oil and Refining Company	" "	41	5-31-50	Note 2	14.65#	419,627	46,159	11.0
J. R. LeBosquet and H. M. Gillespie	" "	6	10- 1-49	956	14.65#	386,692	42,536	11.0
Graham-Michaelis Drilling Company	" "	8	4-30-55	Note 2	14.65#	334,619	36,808	11.0
Gulf Oil Corporation	" "	117	3- 6-47	915	14.65#	1,850,343	203,538	11.0
Hugoton Plains Gas and Oil Company	Gasoline Plant near Liberal, Kansas.	1	9-15-49	Note 2	14.65#	977,528	107,528	11.0
Kansas Nebraska Natural Gas Company	Well Mouth	Unknown	4-15-40	984	14.65#	447,251	49,198	11.
Alfred D. McKelvy	" "	1	3-20-57	704	14.65#	820,381	90,242	11.
Petroleum, Inc. et al	" "	5	3-23-56	778	14.65#	447,464	49,185	11.
Republic Natural Gas Company	" "	9	9-13-45	1028	14.65#	8,924,749	893,379	15.
Republic Natural Gas Company	" "	8	12-21-45	1020	14.65#	21,936,851	4,272,421	19.

Saturn Oil and Gas Company, Inc.	" "	2	12- 1-51	1020	14.65#	408,344	44,953	11.0
Texaco, Inc. (formerly The Texas Co.)	" "	111	5-23-45	976	14.65#	543,000	59,730	11.0
The Trees Oil Company	" "	2	7- 9-45	965	14.65#	613,019	67,432	11.0
Texaco, Inc. (formerly The Texas Co.)	" "	129	2- 9-55	1016	14.65#	955,877	114,705	12.0
Texaco, Inc. (formerly The Texas Co.)	" "	147	2- 9-56	Note 2	14.65#	3,198,198	351,518	11.0
Helmerich and Payne, Inc. (formerly White Eagle Oil).	" "	4	10- 1-50	Note 2	14.65#	766,010	94,261	11.0
Various Vendors (94 Contracts)	" "			Note 2	14.65#	4,424,382	487,016	11.0
Total Kansas Hugoton System						83,512,434	11,411,240	13.7
Kansas Hugoton Deep Gas System (2 Contracts)	Well Mouth				14.65#	152,493	20,355	13.3
Kansas McKinney Fincham System:								
The Atlantic Refining Company	Well Mouth	175	7-15-57	1098	14.65#	1,310,879	183,823	14.0
Graham-Michaelis Drilling Company	" "	2	10- 5-56	1108	14.65#	374,741	52,464	14.0
General American Oil Company of Texas	" "	29	4- 4-55	1097	14.65#	210,196	26,275	12.5
Monsanto Chemical Company	" "	23	4- 3-57	Note 2	14.65#	193,731	31,526	16.3
Various Vendors (8 Contracts)	" "			Note 2	14.65#	351,980	51,339	14.6
Total Kansas McKinney Fincham System						2,441,527	345,127	14.1
Kansas Otis System:								
Various Vendors (8 Contracts)	Well Mouth				14.65#	52,576	1,950	3.7
Kansas Pleasant Valley System:								
Graham-Michaelis Drilling Company	Well Mouth	3	3- 1-57	1021	14.65#	178,398	26,760	15.0
Skelly Oil Company	" "	114	2- 6-57	1020	14.65#	84,476	12,671	15.0
Total Kansas Pleasant Valley System						262,874	39,431	15.0
Kansas Skelly System:								
Various Vendors (5 Contracts)	Well Mouth			Note 2	14.65#	296,517	39,001	13.2
Kansas McElwain System:								
Various Vendors (2 Contracts)	Well Mouth			Note 2	14.65#	39,364	4,845	12.3
Total Gas Purchased						463,115,859	73,333,607	15.8

APPENDIX F

Estimated Cost Impact on Northern Natural, if Kansas Corporation Commission Order Had Been in Effect in 1959

1. *Basic Data*

A. Average Cost of Gas to Northern—1959—as actually incurred. (Data taken from page 89D, Northern Natural Gas Co., Form No. 2, 1959 (Appendix E, p. 56).

Kansas Hugoton Field

	Mcf (col. (f))	Amount (col. (g))	Aver. amount computed from cols. (f) and (g) per Mcf
(1) Total Kansas Hugoton System	83,512,434	$11,411,240	13.664121¢
(2) Less Republic Natural (F.P.C. Rate Sched No. 8)	21,936,851	4,272,421	19.476000¢
(3) Other Kansas Hugoton	61,575,583	$7,138,819	11.593587¢

Total 1959 Gas Purchases

(Data taken from page 89E, Form No. 2)

(4) Total Northern Supply (Acc't 745)	462,763,011	$73,264,037	15.831870¢
(5) Less Kansas Hugoton ((1) above)	83,512,434	11,411,240	13.664121¢
(6) Supply, other than Hugoton	379,250,577	$61,852,797	16.309216¢

B. Kansas Hugoton Allowables and Production (from Appendix D).

	Allowables—Mcf	Produced Mcf	Percent (Allow. to Prod.)
(7) Other Hugoton	112,005,451	62,288,378	55.61
(8) Republic A	25,456,127	21,941,199	86.19
(9) Total Hugoton	137,461,578	84,229,577	61.275

C. Comparison of production figures derived from F.P.C. Form 2 (Set forth in Appendix E and sum-

marized in (1), (2), and (3), *supra*, this Appendix) with similar figures derived from Kansas Commission proration reports (set forth in Appendix D and summarized in (7), (8), (9), *supra*, this Appendix.)

	Form No. 2	*Above figures*
(10) Other Hugoton	61,575,583	62,288,378
(11) Republic A	21,936,851	21,941,199
(12) Total Hugoton	83,512,434	84,229,577

The reason for the variance is not apparent, but the slight difference has no significant effect on results. In the calculations that follow, adjustments to Northern's actual Form No. 2 gas supply and costs will be based upon the ratio of production to allowable derived in B above for determination of dollar impact.

D. Adjusted Kansas Allowables, Based upon Produced Volumes Shown in Northern's Form No. 2.

(13) 83,512,434 (Ref (1)) ÷ 0.61275 (Ref (9)) = 136,291,200 Mcf
Total Allowables

(14) 136,291,200 Mcf (Ref (13)) × 0.8619 (Ref (8)) = 117,469,385 Mcf
Total Hugoton purchase at Republic "A" rate of 86.19%.

	Allowables	*Ratio, allowables to total allowables*
(15) Other Hugoton (Ref (7))	112,005,451	0.8148128
(16) Republic A (Ref (8))	25,456,127	0.1851872
(17) Total Kansas-Hugoton (Ref (9))	137,461,578	1.0000000

Adjusted allowables

(18) Other Hugoton—0.8148128 (Ref (15)) × 136,291,200 (Ref (13))
= 111,051,814 Mcf

(19) Republic A—0.1851872 (Ref (16)) × 136,291,200 (Ref (13))
= 25,239,386 Mcf

111,051,814 (Ref (18)) + 25,239,386 (Ref (19)) = 136,291,200 (Ref (13))

2. Estimated 1959 Cost of Gas to Northern if Northern Had Taken at Same Percentage of Allowables From All Wells as From Republic A (86.19%, Ref (8)).

Adjusted Hugoton Gas Balance

	Mcf
Total Hugoton Purchase (Ref (14))	117,469,385
Less Republic A (Ref(2))	21,936,851
(20) Other Hugoton Purchase	95,532,534

Adjusted Total Gas Balance

	Mcf
Total Purchase (Ref(4))	462,763,011
Less Hugoton Purchase (Ref(14))	117,469,385
(21) Outside Hugoton Purchase	345,293,626

Adjusted Cost of Gas

	Mcf (Ref) (a)	Cents per Mcf (Ref) (b)	Amount (a) × (b) or (Ref.)
Republic A	21,936,851((2))	19.476((2))	$ 4,272,421((2))
Other Kansas-Hugoton	95,532,534((20))	11.5934587((3))	11,075,649
Other Purchases	345,293,626((21))	----------	61,852,797((6))
Total	462,763,011((4))	----------	$77,200,866
Less Actual Payment			73,264,037((4))
Increase			$ 3,936,829

3. Estimated 1959 Cost of Gas to Northern if Northern Had Taken at Same Percentage of Allowables From All Wells as the 1959 Actual Field Average (61.275, Ref (9)).

Adjusted Hugoton Gas Balance

	Mcf	
(22) Other Hugoton 0.61275×111,051,814 (Ref(18))	68,047,000	
(23) Republic A 0.61275×25,239,386 (Ref(19))	15,465,434	
Total (Ref(13))	83,512,434	(Ref(1))

Adjusted Cost of Gas

	Mcf (Ref) (a)	Cents per Mcf (Ref)	Amount (a) × (b) or (Ref.)
Other Hugoton	68,047,000((22))	11.593587	$ 7,889,088
Republic A	15,465,434((23))	----------	4,272,421((2))
Other Purchases	379,250,577((6))	----------	61,852,797((6))
Total Purchase	462,763,011((4))	----------	$74,014,306
Less Actual Payment			73,264,037((4))
Increase			$ 750,269

APPENDIX G

NORTHERN NATURAL GAS COMPANY

F.P.C. Docket No. CP 62–85

Supplement to application, filed June 19, 1962

United States of America Before the Federal Power Commission

Docket No. CP62–85

IN THE MATTER OF NORTHERN NATURAL GAS COMPANY

SECOND SUPPLEMENT TO APPLICATION

Comes now. Northern Natural Gas Company (Northern) Applicant in the above-designated docket and supplements its Application in response to the Commission's letter of April 18, 1962.

I.

The Commission's letter of April 18, 1962 requested Northern to file certain additional data respecting Northern purchases of gas during the year 1960. Attached hereto is a tabulation by gas fields setting forth the minimum volumes required to be purchased, the actual volumes purchased, the dollar amount paid for such gas and the average price per Mcf together with explanatory notes. Additional data respecting the provisions of individual gas purchase contracts has been supplied to the Staff of the Commission in the form of a detailed summary of gas purchase contracts.

Also attached hereto is a gas balance for the year 1960 indicating the total volumes of gas received and the disposition of such volumes.

As the attached tabulation demonstrates, the total volume of gas purchased by Northern during 1960 was apportioned quantitatively among the several gas sources. In general, the particular quantity of gas which was purchased from a particular gas source was determined by contractual obligations between the owner of such gas as seller and Northern as buyer. Northern's contractual obligations with the many owners of gas differed considerably and included obligations to take or pay and obligations to take. These two types of obligations further related to taking specific volumes of gas at specific times, taking volumes of gas determined from the estimation of reserves underlying the property, taking allowable volumes of gas, taking volumes of gas ratably with other purchasers, taking volumes of gas ratably with other volumes purchased by Northern, taking volumes of casinghead gas produced with oil and other varying obligations to take gas. Thus, from Fields other than Kansas Hugoton and excluding takes from Permian Basin Pipeline Company, Northern's gas purchases during 1960 were on the basis of the minimums required under the various contracts. The difference between Northern's total requirements and the minimum contract volumes required to be taken from areas other than Kansas Hugoton was taken from Kansas Hugoton. The total volume purchased by Northern from Permian during these periods was limited to the volume which Permian was certificated to sell and deliver to Northern.

Wherefore, Northern respectfully prays as in its Original Application and requests the Commission promptly to issue a certificate of public convenience

and necessity as requested in its Application as Amended and Supplemented.

Respectfully submitted,

NORTHERN NATURAL GAS COMPANY,

By [S] E. B. BLEASE,

Vice President.

Dated: June 19, 1962.

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STATE OF NEBRASKA, COUNTY OF DOUGLAS, *ss:*

E. B. Blease, of lawful age, being first duly sworn on oath, states that he is Vice President of Northern Natural Gas Company; that he has read the foregoing Second Supplement to Application and knows the contents thereof; and that the facts set forth therein are true as he verily believes.

[S] E. B. BLEASE, *Vice President.*

Subscribed and sworn to before me this 19th day of June, 1962.

[S] PATRICIA A. WARNER, *Notary Public.*

NORTHERN NATURAL GAS COMPANY

F.P.C. Docket No. CP 62-85

Tabulation of 1960 Gas Purchases for Northern, referred to at p. 62, *supra.*

NORTHERN NATURAL GAS COMPANY

1960 GAS PURCHASES

MCF @ 14.73⁰

System	Minimum volume required to be purchased *	Volume purchased	Amount paid	Average price per MCF
Field				*Cents*
North Hutchinson System—Texas:				
Southland Royalty Field	1,020,369	1,020,369	$170,899.84	16.800
North Hutchinson (White Lime) Field	361,827	361,827	60,692.01	16.782
North Hutchinson (Douglas) Field	340,284	340,284	46,698.05	13.158
North Hutchinson (Marmaton) Field	946,215	946,215	124,471.18	13.155
North Hutchinson (Upper Douglas) Field	226,680	226,680	31,547.65	13.922
North Hutchinson (Cleveland) Field	313,529	313,529	45,037.69	14.365
System total	3,128,045	3,128,045	457,436.22	14.624
Kirk System—Texas:				
John Creek Field	273,881	273,881	46,437.17	16.500
Spearman-Honolulu System—Texas:				
Bernstein, Morrow, Upper Field	1,551,694	1,551,694	265,149.99	15.992
Hansford, North, Douglas Field	388,106	388,106	57,888.96	15.643
Hansford, North, Tonkawa Field	4,437,962	4,437,962	714,611.14	16.139
Hansford, North, Low Pressure Morrow, Field	61,547	61,547	10,210.70	16.590
Hansford, North, Morrow Field	2,403,740	2,403,740	388,792.46	16.173
Hansford, Upper Morrow Field	17,564,835	17,564,835	2,901,074.15	16.516
Hansford, Middle Morrow Field	995,467	995,467	163,990.86	16.500
Hansford, Lower Morrow Field	6,294,563	6,294,563	1,017,495.61	16.169
Lipe, Morrow Field	1,747,076	1,747,076	288,841.53	16.530
East Spearman Field	838,645	838,645	142,615.89	16.500
Twin Tonkawa Field	44,496	44,496	7,381.92	16.590
Hitchland, 6900' Field	545,712	545,712	90,894.69	16.500
Farnsworth, Upper Morrow Field	30,377	30,377	5,039.57	16.590
Hansford, Marmaton Field	194,570	194,570	32,289.69	16.590
Horizon, Cleveland Field	1,826,417	1,826,417	303,094.69	16.590
Horizon, Upper Morrow Field	44,998	44,998	7,468.57	16.590
Spearman, East Atoka Field	17,998	17,998	2,984.88	16.580
Miscellaneous Fields	10,535,950	10,535,950	1,792,288.14	16.449
System total	49,718,373	49,718,373	8,165,429.78	16.423
Blank System—Texas:				
Blank Area	286,186	286,186	47,478.31	16.590
Northrup System—Texas:				
Northrup Field	894,988	894,988	144,984.82	16.192
Dude Wilson, Hepler Field	101,716	101,716	16,874.76	16.590
Dude Wilson, Atoka Field	90,151	90,151	14,956.13	16.590
Dude Wilson, Marmaton Field	3,867	3,867	644.88	16.590
Dude Wilson, Lower Morrow Field	238,807	238,807	39,560.57	16.562
Ellis Ranch Field	102,990	102,990	16,852.44	16.657
Miscellaneous Fields	315,188	315,188	52,798.99	16.353
System total	1,750,532	1,750,532	288,270.57	16.363

NORTHERN NATURAL GAS COMPANY—Continued

System	Minimum volume required to be purchased	Volume purchased	Amount paid	Average price per MCF
Field				Cents
Perryton System—Texas and Oklahoma:				
Perryton, Lower Morrow Field	2,086,886	2,086,886	$342,337.17	16.187
Perryton, Douglas Field	6,027	6,027	939.29	15.585
Perryton, Keyes Field	240,691	240,691	37,510.60	15.588
Perryton, West, Morrow Field	1,567,079	1,567,079	245,623.96	15.674
Perryton, Lower Novi Field	196,512	196,512	30,625.70	15.585
Perryton, Upper Morrow Field	253,614	253,614	42,074.78	16.590
Canyick Field	351,640	351,640	56,222.26	16.071
Dower Field	2,077,310	2,077,310	325,779.59	15.683
Miscellaneous Fields	1,418,150	1,418,150	228,945.40	16.145
System total	8,167,909	8,167,909	1,300,159.07	15.918
Elmwood-Camp Creek System—Oklahoma:				
Mocane, Morrow Field	290,966	290,966	47,963.51	16.482
Six Mile, Morrow Field	275,620	275,620	43,754.93	15.878
Mocane, Tonkawa Field	1,544,807	1,544,807	257,213.87	16.650
South Mocane, Morrow Field	419,471	419,471	71,989.39	17.159
Elmwood, Morrow Field	714,971	714,971	124,989.31	17.479
System total	3,245,887	3,245,887	545,832.01	16.816
Eyer System—Oklahoma:				
Eyer Area	88,536	88,536	14,640.89	16.537
Ridgeway System—Oklahoma:				
Mocane, Chester Field	545,219	545,219	88,253.89	16.187
Mocane, Tonkawa Field	119,184	119,184	20,091.03	16.857
System total	664,403	664,403	108,344.62	16.307
Highland System—Oklahoma:				
Laverne, Council Grove Field	12,036	12,036	2,067.29	17.093
Laverne, Hoover Field	586,458	586,458	100,242.23	17.098
Laverne, Morrow Field	105,890	105,890	18,089.59	17.080
Laverne, Chester Field	36,257	36,257	6,197.36	17.093
Laverne, Tonkawa Field	161,549	161,549	27,613.29	17.093
System total	902,190	902,190	154,209.75	17.093
Glenwood-Gate Lake System—Oklahoma:				
South Glenwood, Chester Field	2,112,441	2,112,441	352,250.78	16.675
South Glenwood, Morrow Field	1,429,948	1,429,948	239,915.88	16.778
Northwest Doby Springs, Chester Field	1,716,532	1,716,532	282,499.60	16.458
Northwest Doby Springs, Morrow Field	80,042	80,042	13,176.23	16.465
System total	5,338,963	5,338,963	887,842.49	16.630
Glenwood, Northeast System—Oklahoma:				
Glenwood, Northeast Field	41,284	41,284	4,078.86	9.880
McKinney-Fincham System—Kansas:				
McKinney Field	2,183,823	2,183,823	308,004.75	14.012
Fincham Field	394,156	394,156	65,071.56	16.507
System total	2,577,979	2,577,979	371,076.31	14.394

NORTHERN NATURAL GAS COMPANY—Continued

System	Minimum volume required to be purchased	Volume purchased	Amount paid	Average price per MCF
Field				*Cents*
Harper Ranch System—Kansas:				
Harper Ranch Field	4,274,293	4,274,293	$624,677.31	14.615
Northeast Morrison Field	297,315	297,315	44,840.71	15.082
System total	4,571,608	4,571,608	669,518.02	14.645
Stredtman System—Kansas:				
Cavalry Creek Field	19,298	19,298	2,425.40	12.568
Hockett System—Kansas:				
Hockett Field	170,849	170,849	25,767.10	15.082
Pleasant Valley System—Kansas:				
Pleasant Valley Field	356,773	356,773	53,806.15	15.082
McElwain System—Kansas:				
Joy Field	17,396	17,396	2,233.37	12.839
Shelly-Embry Systems—Kansas:				
Embry-Edstaff, Mississippian Field	390,918	390,918	44,813.02	11.465
Embry-Edstaff, Misner Field	465,989	465,989	59,172.83	12.977
Embry-Edstaff, Basal Pennsylvanian Field	82,417	82,417	11,187.08	13.574
Belpre Field	154,906	154,906	20,908.42	13.554
System total	1,094,230	1,094,230	136,169.35	12.559
Benson System—Kansas:				
Benson Area (Casinghead)	497,792	497,792	62,088.26	12.473
Hugoton-Deep (Oklahoma) System:				
Calvert Area	29,689	29,689	4,470.15	15.062
Hicks Area	123,697	123,697	14,924.70	12.066
South Hovey Field	257,079	257,079	31,017.94	12.066
Richland Center Field	693,433	693,433	83,666.36	12.066
System total	1,103,848	1,103,848	134,079.15	12.147
Hugoton-Deep (Kansas) System:				
Greenwood Field	176,084	176,084	23,283.53	13.197
Rolla Field	44,586	44,586	5,379.53	12.066
Salley Area	93,307	93,307	11,256.08	12.066
Wilburton Field	91,228	91,228	12,219.03	13.394
Wide Awake Field	52,402	52,402	8,430.08	16.088
Panoma Field	5,681	5,681	599.60	11.681
System total	462,638	462,638	61,080.05	13.203
Camrick System—Oklahoma:				
Camrick Field	12,385,921	12,385,921	2,379,902.24	19.215
Permian Basin Pipeline Company	171,728,011	171,728,011	34,313,397.66	19.981
Panhandle System:				
West Panhandle Field	83,389,684	83,389,684	7,796,688.21	19.981
Sunray System:				
Sunray Area	37,732,046	37,732,046	4,619,132.19	12.242
Hugoton—Shallow (Oklahoma) System:				
Hugoton Field	31,060,016	31,060,016	4,391,298.12	13.949
Hugoton—Shallow (Kansas) System:				
Hugoton Field	(b)	121,757,771	14,448,696.90	11.868
Grand total	511,322,007	511,322,007	81,411,850.81	15.916

EXPLANATORY NOTES

[a] Recently, when Northern has been experiencing a temporary imbalance between purchase commitments and market requirements, it has followed a policy of purchasing minimum quantities of gas under its numerous gas purchase contracts. The minimum quantity of gas to be purchased during a particular period of time under individual contracts is, however, substantially influenced by numerous factors. For example, Northern's obligation to purchase gas:

(1) in certain cases in specific volumes; and

(2) in other cases in specific volumes at the outlet of specified gasoline plants; and

(3) in other cases on a ratable basis with all other gas purchased by Northern; and

(4) in other cases on a ratable basis with other gas purchased by Northern after excluding volumes purchased from another supplier, the priority of which was agreed to by the ratable Seller; and

(5) in other cases on only a reserve basis; and

(6) in other cases on the greater of:

(i) a reserve basis; or

(ii) ratably with Northern's purchases from others in the same common reservoir; and

(7) in other cases on the greater of:

(i) a reserve basis; or

(ii) ratably with Northern's purchases from others in the same common source of supply; or

(iii) ratably with other pipelines' purchases from others in the same common source of supply;

In many instances has been altered by the proration of production by state regulatory agencies, whereby the volume of gas to be purchased is determined by standards other than as written in the contract. Further, many of Northern's contracts provide for attainment of the purchase obligation over the period of a contract year which does not coincide with a calendar year. For these reasons and because of fluctuating market demands, during any given calendar year the volume of gas purchased under a given contract may be greater or less than the written contractual obligation depending upon whether the volume of gas to be purchased was influenced by proration and or other factors such as prior under purchases or prior over purchases. Accordingly, in Northern's judgment, the volumes of gas listed in this column are, within practical and reasonable limits of prudent operations or for reasons beyond the control of Northern, the minimum volumes required to be purchased during the calendar year 1960.

[b] (i) All of Northern's gas purchase contracts in this Field, except its "A" Contract with Republic Natural Gas Co. (now Socony Mobil Oil Co., Inc.) dated 12-21-45, provide that Northern will purchase gas from Sellers thereunder ratably with all natural gas purchased by Northern from such Field over reasonable periods of time, subject however, to Northern's prior obligation to purchase specified volumes of gas under said Republic "A" Contract.

(ii) The Republic "A" Contract, as written, provides that Northern would purchase thereunder 60% of the gas requirements of its "Omaha District," as therein defined, up to a total of 36,500,000 Mcf (16.4%) (which equates to 40,860,067 Mcf or 14.7%) annually. Sixty per cent of such Omaha District now and for many years past has far exceeded said 36,500,000 Mcf annually. It is Northern's position that the Kansas Supreme Court, in the case of *Northern Natural Gas v. Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708, determined that Northern fulfills its obligation to purchase under this Contract when it purchases the legal net allowables of the Republic "A" wells. It is Northern's further position that the "ratable take" orders issued by the Kansas Corporation Commission limit the volume of gas Northern may lawfully purchase from the wells under this Contract to such wells' ratable share of Northern's actual market requirements from this Field.

Republic has commenced two actions (Cases No. 4165 and No. 4235) in the District Court of Stevens County, Kansas, alleging breaches of said "A" Contract during the period from July 1, 1955 to June 30, 1961, and seeking recovery of damages totaling approximately $26,000,000. In addition to a claim for punitive damages, Republic seeks recovery of $15,649,948.26 representing the difference between the volumes actually purchased by Northern and the claimed contractual

obligation to purchase 36,500,000 Mcf (16.4#) of gas annually. Alternatively to the $15 million plus damages sought, Republic seeks recovery of $1,689,402.99 which represents the difference between the allowable granted to the Republic "A" wells and the volume of gas purchased by Northern therefrom during the contract years commencing July 1, 1959 and July 1, 1960, during which years the "ratable take" orders issued by the Kansas Corporation Commission were effective.

(iii) Although Northern has no contractual obligation to purchase minimum volumes under its other ratable contracts (see Note (i) above), if Northern must purchase either (1) 40,860,067 Mcf annually or (2) the legal net allowable under the Republic "A" Contract (see Note (ii), above) and purchase ratably under these other contracts in accordance with the "ratable take" orders of the Kansas Corporation Commission, then the minimum volume required to be purchased under the ratable contracts during 1960 would have been (1) 183,791,448 Mcf or (2) 118,843,155 Mcf.

(iv) If the "ratable take" orders of the Kansas Corporation Commission referred to in Note (ii) limit the volume of gas Northern may lawfully purchase from the wells under each of its contracts to such wells' ratable share of Northern's actual market requirements, then the minimum volume required to be purchased by Northern during 1960 would have been equal to the volume actually purchased, namely 121,557,771 MCF.

If Northern was obligated to purchase 40,860,607 MCF under the Republic "A" Contract (see Note (ii)) and purchase ratably under all its other contracts in accordance with said "ratable take" orders of the Kansas Corporation Commission, then the minimum volume required to be purchased under all contracts during 1960 would have been 224,651,515 (183,791,448 (see Note (iii)) plus 40,860,067).

If Northern was obligated to purchase the 1960 current allowable of 26,420,972 MCF as assigned by the Kansas Corporation Commission to the wells under the Republic "A" Contract, if such allowable is legal, and purchase ratably under all its other contracts in accordance with said "ratable take" orders of the Kansas Corporation Commission, then the minimum volume required to be purhased under all its contracts during 1960 would have been 145,264,127 MCF (118,843,155 (see Note (iii)) plus 26,420,972 MCF).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 62

NORTHERN NATURAL GAS COMPANY, A Corporation,
Appellant,

v.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee*.

On Appeal from the Supreme Court of Kansas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE MID-CONTINENT OIL & GAS ASSOCIATION IN SUPPORT OF APPELLEE, AND BRIEF AMICUS CURIAE BY THE MID-CONTINENT OIL & GAS ASSOCIATION

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November 12, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Movant, Mid-Continent Oil & Gas Association, pursuant to the provisions of Rule 42 (3) of this Honorable Court, respectfully moves that it be granted leave to file the accompanying brief amicus curiae in this case. The consent of the appellee has been obtained. The consent of appellant was requested but refused.

The Mid-Continent Oil & Gas Association has approximately 8,500 members, with its principal office in Tulsa, Oklahoma. The members of this Association are actively engaged in one or more phases of the oil and gas industry. The Association is principally concerned with matters relating to the production phase of the industry, and consequently the Association has been and is now particularly concerned with the ef-

fective administration of the conservation laws of the various oil and gas producing states.

The Association is vitally concerned with the outcome of this case because if this Court now determines that the states may not regulate the production of gas in order to protect the correlative rights of the owners thereof if such regulation incidentally affects sales of gas in interstate commerce, then the anarchy that existed in the production of oil and gas prior to the adoption of conservation laws by the producing states may again, ultimately, prevail.

It is not the purpose of the accompanying brief to argue in detail the specific issues of this case; that has been ably and correctly done by appellee. It is the purpose of the brief to point out to the Court that a decision in favor of the appellee is required if the oil and gas producing states are to be able, in the future, to administer, effectively, the oil and gas conservation policies with which they have been entrusted.

Wherefore, Movant prays that this Court grant this motion and permit the filing herein of the attached brief in support of appellee.

Respectfully submitted,

MID-CONTINENT OIL & GAS ASSOCIATION

By R. J. STANTON

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BRIEF AMICUS CURIAE BY THE MID-CONTINENT OIL & GAS ASSOCIATION

INTEREST OF AMICUS CURIAE

The interest of the Amicus in this case is set forth in the motion to which this brief is attached.

QUESTION PRESENTED

The broad question inherent in this case is whether the Natural Gas Act preempts the authority of the states to regulate the production of gas within their boundaries for the purpose of preventing waste and protecting the correlative rights of the owners thereof.

STATEMENT

On October 7, 1959, and on February 3, 1960, the State Corporation Commission of Kansas, after due notice and public hearing, issued the Orders and Rule involved in this case. The Rule provides for the ratable production of gas from each common source of supply under proration by the Commission by requiring each purchaser to take gas in proportion to the allowables from all the wells to which it is connected. In promulgating such Rule the Commission found that the Rule met the *mandate* of G. S. 1949, 55-703, as amended, which directs the Commission to "so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply." This statute is the Kansas Gas Conservation Act, and the purpose of the portion thereof quoted above is to implement the conservation laws of the state by protecting the correlative rights of the owners of gas in a common source of supply. 1 Summers, Oil and Gas (perm. ed.), Sec. 63, pp. 180-181.

The term "correlative rights of the owners of gas in a common source of supply" connotes property rights. The term merely means that each owner in a common source of supply is entitled to the opportunity to produce, as a property right and in an amount determined by the state, his just and equitable share of gas from the common source of supply; and that no owner has the right to take an undue proportion of such common source of supply.

As early as 1900 this Court in the landmark case of *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190, recognized that the correlative rights of the owners of oil and gas in a common source of supply are property rights upon which the legislative power of the states may be "manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste."

There is no longer any serious question that the states have the power, consistent with the commerce clause and the due process clause of the Fourteenth Amendment, to protect the correlative rights of the owners of oil and gas in a common source of supply by requiring the ratable taking thereof. This power of the states has been consistently upheld as a proper exercise of authority to implement the public interest of the states in the conservation of oil and gas. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179 (1950); *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8 (1931); *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210 (1932).

Thus, for many years, the legislatures of the oil and gas producing states have manifested their powers to protect the correlative rights of the owners of oil and gas in a common source of supply. This power has been exercised by these legislatures in various forms; sometimes by declaring all purchasers in a common source of supply to be common purchasers, *e.g.*, 52 *Oklahoma Statutes Annotated*, Section 240, and sometimes by delegating to a state regulatory agency authority to protect correlative rights by appropriate rules and regulations such as Kansas has done here. Whatever

may be the means selected by these legislatures to protect correlative rights, all are legitimate exercises of state legislative power, and it is submitted that the Kansas Orders and Rule in question are no exception.

It is clearly evident from the record in this case that the Commission issued the ratable take Orders and Rule in order to prevent drainage as among Kansas owners while still allowing them to produce their fair share of the total gas in the reservoir. As the Kansas Supreme Court noted at 362 P. 2d 601:

> "We do not read the record to show that there is any contention but that drainage was occurring, and that the under-produced wells were losing the right to produce gas from the common source of supply to the great damage of the owners of the wells in the loss of their correlative rights."

A ratable take order requires each purchaser to take gas from all wells to which it is connected in proportion to the allowables of the wells. Such an order does not require the purchaser to take any particular volume of gas but only that its taking of gas must be apportioned among the various wells to which it is connected. In other words, ratable take orders are designed to prevent discrimination by purchasers against the owners and producers from which they are taking gas from a common source.

Although appellant maintains that the Orders and Rule herein are invalid since they attempt to regulate the sale of gas in interstate commerce simply because they are directed toward purchasers, the facts are that the Orders and Rule do not attempt to regulate any of the aspects of a sale by a producer to a pipeline purchaser. These Orders and the Rule *do not* direct a purchaser to take *any volume* of gas, *at any time* or *at any*

price. All that these Orders and Rule do is to direct purchasers to take proportionately from all wells to which they are connected in order that each owner will be able to produce and enjoy his fair share of the common source of supply. That the Orders and Rule are directed toward purchasers does not change this fact. Ratable take orders must necessarily be directed toward purchasers if the correlative rights of owners of gas are to be protected. The Kansas Supreme Court correctly noted this fact at 362 P. 2d 603 when it stated that:

> "We believe Northern is mistaken in arguing that the above statute and the rules made thereunder do not apply to a purchaser of natural gas. We are only more convinced that the legislature had this in mind, by the fact that natural gas cannot be produced unless someone is ready to buy it, it cannot be stored in a tank on the lease. Therefore, as Professor Summers says, the object of the quoted provisions of section 55-703, cannot be accomplished unless the taker or purchaser can be controlled. We believe the statute is sufficient to reach Northern."

Undoubtedly, the Orders and Rule in question are a valid exercise of the power of the State of Kansas to protect the correlative rights of the owners of gas in a common source of supply located within its boundaries, unless this power was taken from the states by Congress when it enacted the Natural Gas Act, 15 U.S.C.A. 717 et seq.

It is submitted as beyond question that the Natural Gas Act does not preempt the field of regulation to the *complete* exclusion of otherwise valid state action relating to conservation of oil and gas. The Natural Gas Act does not completely preempt the field of regulation by the states.

Section 1 (b) of the Natural Gas Act, 52 Stat. 821 (1938), 15 U.S.C. 717 (b), provides as follows:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but *shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution *or to the production or gathering of natural gas.*" (Emphasis supplied)

This Court has held, in interpreting this section of the Act, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954), that, "There can be no dispute that the overriding Congressional purpose was to plug the 'gap' in regulation of natural gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate aspects of the natural gas business." In other words, the purpose of the Act is to provide a regulatory scheme in the areas where the states are not constitutionally competent to act. It is equally clear that it was not the purpose of Congress to preempt the authority of the states in areas where they are constitutionally competent to act, and thus this Court has held that the purpose of the production and gathering exemption of Section 1 (b) of the Act is to preserve in the states powers of regulation in areas in which the states are constitutionally competent to act. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581 (1945);

Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682 (1947); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).[1] It has been shown above that the power of the states to protect the correlative rights of the owners of oil and gas in a common source of supply is within an area in which the states are constitutionally competent to act. It should, therefore, be equally clear that the power to implement the conservation of oil and gas by the protection of correlative rights has been preserved to the states and withheld from the jurisdiction of the Federal Power Commission by Section 1 (b) of the Act.

The Federal Power Commission itself, contrary to its Memorandum in response to this Court's order of

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[1] In *Hope*, 320 U.S. 612-613, the Court stated:

> ". . . the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over 'the production or gathering of natural gas.' § 1(b). In addition, Congress recognized the legitimate interests of the States in the conservation of natural gas. By § 11 Congress instructed the Commission to make reports on compacts between two or more States dealing with the conservation, production and transportation of natural gas. The Commission was also directed to recommend further legislation appropriate or necessary to carry out any proposed compact and 'to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.' § 11(a). Thus Congress was quite aware of the interests of the producing states in their natural gas supplies."

Interstate, *Colorado Interstate*, *Panhandle* and *Phillips* reaffirm that the Act does not intrude on the domain traditionally reserved for control by state commissions, and thus "accordingly, Congress in § 1 (b) of the Act not only prescribed the intended reach of the Commission's power, *but also specified the areas into which this power was not to extend.*" *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 503. (Emphasis supplied)

March 19, 1962 (369 U.S. 814), has recognized that it has no jurisdiction over matters relating to the ratable production of natural gas, the correlative rights of producers and proration of production among producers producing natural gas from common reservoirs. See Appendix A, *Order Denying Petition for Leave to Intervene* issued October 17, 1962, *Lone Star Gas Gathering Company*, Docket No. CP62-179. As stated by the Commission in this Order:

> "We have carefully considered the allegations of Petitioner and the answer thereto filed by Lone Star. The matters upon which Petitioner desires to be heard in this proceeding relate to the ratable production of natural gas, the correlative rights of producers and proration of production among producers producing natural gas from common reservoirs. *We are of the opinion that these are matters which lie within the sphere of state control and cannot constitute a basis for intervention in the proceedings before this Commission.*" (Emphasis supplied)

We submit that the Federal Power Commission is eminently correct that matters *relating* to the *ratable* production of natural gas, which necessarily includes the taking thereof, are matters which are within the sphere of state control *and not within the sphere of federal control.* If this is so and this Court holds, as appellant would have it do, that the Orders and Rule here in question are invalid because being directed toward purchasers they affect sales of gas in interstate commerce, then a "gap" will be created in the comprehensive scheme of regulation intended by Congress when it passed the Natural Gas Act for the reason that, then, neither the states nor the Federal Power Commission could thereafter *act* over matters relating

to the ratable production of natural gas, the correlative rights of producers and proration of production.

The Kansas Orders and Rule in question in this case lie within the sphere of state control even though the Orders and Rule are directed to purchasers of natural gas from each common source of supply. The gist of appellant's argument is that because the Orders and Rules are directed toward purchasers they constitute an attempt by Kansas to regulate the sale of gas in interstate commerce. Nothing could be further from the truth.

State orders requiring ratable purchase or takes are designed to protect the correlative rights of producers in a common source of supply. This fact has been recognized by an eminent authority in the field of oil and gas law:

> "Statutes making pipe line companies common purchasers of oil and gas are, in purpose and effect, conservation measures, and so operate, whether the production of oil or gas from a common source of supply is or is not restricted and prorated among the wells therein for the prevention of waste. Courts in most of the oil and gas producing states have held that a state may validly legislate for the prevention of waste of oil and gas and for the protection of the correlative rights of owners and lessees, in a common source of supply. Legislative enactments and judicial opinions have repeatedly stated that conservation measures and the orders and regulations of conservation agencies should be such as to afford the owner of each tract of land in a common source of supply of oil or gas the opportunity to produce his just and equitable share of the oil or gas therein and to use therefor his just and equitable share of the reservoir energy. Unless all the producers in a common source of supply

> have equal opportunity to sell or to transport oil and gas from their wells, they are not afforded the opportunity to produce their just and equitable share of the oil or gas or to utilize their just and equitable share of the reservoir energy." (4 Summers, *Oil and Gas*, Perm. Ed., Sec. 754, p. 182)

Although the Kansas statute is not a "common purchaser" statute in that it does not expressly state that purchasers of gas in a common source of supply may be required to take ratably from all wells to which they are connected, the Kansas Court in this case correctly noted that unless the Commission has such authority it cannot prevent inequitable and unfair taking and *prevent discrimination in favor of or against any producer* in the common source of supply.

Whether the oil and gas producing states endeavor to protect correlative rights by enacting common purchaser statutes or by general statutes such as the Kansas statute, is immaterial. The point is that the power preserved to the states under the Natural Gas Act to protect the property interests of all the owners of a common source of supply can be effectuated *only* by requiring the purchasers receiving gas from such common source of supply to take proportionately from all of the wells to which each may be connected.[2] This is

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[2] Appellant, at page 19, footnote 1 of its Brief, states that a state may restrict the production from developed leases for the purposes of conservation *and protection of correlative rights.* (Emphasis supplied) It would therefore appear that appellant concedes that the power to protect correlative rights has been preserved to the states. This concession, as stated by appellant, is, however, illusionary. Orders of a state establishing allowable production from the wells in a field in no way assure an owner of such production that his interest will be produced and taken. Appellant, therefore, concedes the power of the states to protect correlative rights but would deny to the states the means of implementing that power.

all that the Orders and Rule complained of are designed to do.

The Federal Power Commission recognizes that the property interests of the owners of gas in a common source of supply can be protected by the state only by requiring pipeline purchasers to take proportionately from all wells to which each may be connected and that therefore state ratable take orders *relate to production*. Such recognition by the Federal Power Commission is indicated by its Memorandum, at page 25, where it is stated:

> "The natural gas industry differs from other industries in that *the production* of the commodity (i.e., the withdrawal of gas from the well) and its movement into interstate channels constitute one and the same physical operation. Thus, a regulation limiting the volume a pipeline may purchase from a given well would be tantamount in effect to a limitation upon the production of that well."

And, obviously, this statement is consistent with the view of that Commission that these matters (*i.e.*, ratable, production of natural gas and protection of correlative rights) are within the sphere of state control; that is, these matters fall within the "production and gathering" exemption of Section 1 (b) of the Act.

It thus appears to be undisputed that (1) the states have the constitutional power to require purchasers to take gas ratably from all wells to which they may be connected in a common source of supply in order to protect the correlative rights of the owners thereof; (2) this power of the states was not preempted by Congress when it passed the Natural Gas Act; and (3) *in general*, orders and regulations of a state, imple-

menting that power, fall within the "production and gathering" exemption of Section 1 (b) of the Act.

The Federal Power Commission, however, goes further and argues that the *particular* Kansas Orders and Rule in question do not fall within the "production and gathering" exemption of Section 1 (b) of the Act. The Commission argues that Northern cannot comply with the Orders and Rule in question without incurring, under take or pay for provisions of its contracts, additional costs which "would ultimately fall upon the consumers" (Federal Power Commission Memo., pp. 25-28). It therefore concludes that these Orders and Rules "measured by their practical consequences (still assuming that they provide no relief from contract obligations) are plainly a regulation of sales for resale in interstate commerce."

However, the "impact" on Northern, upon which the Federal Power Commission bases its position, would appear to be not the result of the Kansas ratable take orders, but rather the result of Northern's own contractual arrangements, which were presumably entered into with knowledge that mineral owners possess correlative rights in common sources of supply and that the states have authority to protect those rights. The ultimate consumer will not necessarily bear the impact of any increased costs which may result from Northern's contractual arrangements if such arrangements are deemed improvident by the Federal Power Commission. See *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 252 F. 2d 619 (D.C. Cir. 1957), *cert. den.*, 355 U.S. 904 (1957). Further, there is nothing in the record to show that Northern will not be able in the future to comply with

both the ratable take order and the take requirements of its contracts. As a matter of fact, the record is also barren of any evidence that Northern will not be able to take without further cost all gas previously paid for, but not taken.[3]

In effect, what the Federal Power Commission simply says, as did appellant in the Kansas Court, is that the *valid* orders of a state requiring ratable takes of gas from a common source of supply *are unenforceable* against interstate pipeline companies if such orders are incompatible with the contractual obligations of the pipeline with its producer supplier. In other words, as stated by the Kansas Court below, 362 P. 2d at page 603, the argument is:

> "that the contract has established the correlative rights of the parties, and that therefore, the state is powerless to prevent waste and drainage of gas as long as the monthly allowables are not unlawfully exceeded."

State orders and regulations relating to the conservation of gas and protection of correlative rights, of necessity, may often have, to a greater or lesser degree, some incidental effect on sales for resale in interstate commerce. And it may be conceded that such orders and regulations may at times so affect such sales as not to fall within the "production and gathering" exemption of Section 1 (b), *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S.

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[3] Much of the Federal Power Commission's Memorandum is devoted to an attack upon the level and the method of establishing production allowables. Since the orders establishing these allowables are not here under review, all arguments based upon their supposed invalidity are, of course, entirely irrelevant to the issue in the cas at bar.

391 (1958), but, we submit that to hold, as appellant and the Federal Power Commission would have this Court do, that pipeline purchasers of gas may preempt by contract the authority of the states so that they are powerless to enforce their legitimate orders and regulations to the extent that such orders and regulations affect the obligations of interstate pipeline purchasers under such contracts, is wholly and completely untenable. Such a holding would grant to interstate gas pipeline companies *carte blanche* to establish their rights and duties with respect to the conservation of gas and protection of correlative rights by private contract, free and immune from any regulation whatsoever by any duly constituted governmental authority, either state or federal.

CONCLUSION

We submit that it is abundantly clear, as established by the decisions of this Court, that the Natural Gas Act does not preempt the power of the oil and gas producing states to protect the correlative rights, *i.e.*, the property, of the owners of a common source of supply. We also submit, as has been shown above, that if the oil and gas producing states are to effectively implement this power so preserved to them, then they must also have the authority to require purchasers of gas to take proportionately from all wells to which they may be connected in a common source of supply even though the exercise of such authority by the states may affect, incidentally, sales of gas in interstate commerce. To hold otherwise will disturb, to the detriment of all, the existing federal-state relationship in the field of conservation by denying to the states authority to act in an area in which Congress has not empowered the Federal Power Commission to act.

For these reasons, we respectfully urge this Court to uphold appellee.

Respectfully submitted,

MID-CONTINENT OIL & GAS ASSOCIATION

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November 12, 1962

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Lone Star Gas Gathering Company) Docket No. CP62-179

Order Denying Petition for Leave to Intervene

(Issued October 17, 1962)

On March 5, 1962, Alamo Gas Supply Company (Petitioner) filed a petition for leave to intervene in the above-entitled proceeding which is upon an application for a certificate of public convenience and necessity filed by Lone Star Gas Gathering Company (Lone Star) pursuant to Section 7 (c) of the Natural Gas Act. By its application Lone Star seeks authorization to construct and operate pipeline facilities and to sell and deliver natural gas to United Gas Pipe Line Company in Victoria County, Texas, for transportation and sale in interstate commerce.

Petitioner is an intrastate gas company engaged in selling natural gas to the City of San Antonio, Texas. In its petition, Petitioner alleges that a portion of its gas supply comes from certain reservoirs partly under contract to Lone Star, and that, in the event a certificate is granted to Lone Star, the reserves dedicated to Petitioner are in danger of being drained by Lone Star. Petitioner alleges further that this situation thereby creates a conflict with respect to particular reserves dedicated to it and Lone Star and it cannot be assured of receiving its fair share of gas taken from the common reservoirs.

An answer to the petition was filed by Lone Star on March 12, 1962.

We have carefully considered the allegations of Petitioner and the answer thereto filed by Lone Star. The matters upon which Petitioner desires to be heard in this proceeding relate to the ratable production of natural gas, the correlative rights of producers and proration of production among producers producing natural gas from common reservoirs. We are of the opinion that these are matters which lie within the sphere of state control and cannot constitute a basis for intervention in the proceedings before this Commission.

The Commission finds:

Alamo Gas Supply Company has not shown that its participation in this proceeding is in the public interest or that the matters set forth in its petition affect interstate commerce or can properly be considered by the Commission in determining the merits of an application for a certificate of public convenience and necessity.

The Commission orders:

The petition for leave to intervene filed by Alamo Gas Supply Company be and it hereby is denied.

By the Commission.

/s J. H. Gutride
Joseph H. Gutride
Secretary.

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No. 62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF APPELLEE

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IN THE

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OCTOBER TERM, 1962

No. 62

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF APPELLEE

STATUTES, ORDERS AND RULE INVOLVED

The Order of the State Corporation Commission found valid by the Kansas Supreme Court in Case No. 42,128 provides in pertinent part as follows:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field."

The Order and Rule of the State Corporation Commission found valid by the Kansas Supreme Court in Case No. 42,127 provide in pertinent part:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960. * * *
>
> RULE 82-2-219
>
> RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY.
>
> "In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959 Supp., 55-703; effective February 8, 1960)."

The Kansas statutes upon which the aforesaid Orders and Rule of the State Corporation Commission are based (G.S. 1961 Supp., 55-703 and G.S. 1949, 55-704) are set forth in Appendix A. The relevant sections of the Natural Gas Act (15 U.S.C. 717 *et seq.*) appear in appellant's brief as Appendix G.

QUESTIONS PRESENTED

1. Whether the Natural Gas Act deprives the State of Kansas of the authority to prevent drainage and thus protect the correlative rights of owners of natural gas resources within the State by requiring all purchasers from common sources of supply to take gas ratably from all of the wells to which they are connected?

2. Whether ratable take orders of the State of Kansas are invalid under the Natural Gas Act as applied to appellant, a purchaser of natural gas in Kansas, by reason of appellant's special contractual relationships with particular natural gas producers?

STATEMENT OF THE CASE

This litigation involves the validity of orders issued by the Kansas Corporation Commission in 1959 and 1960, which require each purchaser of natural gas from common sources of supply in Kansas, including appellant, to take ratably from its well connections in those common sources. The orders do not provide that appellant or any other purchaser of gas must take particular volumes of gas, or indeed any gas whatever, from any field or from any producer or group of producers in Kansas. They do not establish or set the price to be paid for any gas. They direct only that a purchaser of gas may not discriminate among its well connections by taking disproportionately low or high volumes of gas from particular wells, thus creating drainage of underground gas across lease lines to the injury and prejudice of the correlative rights of the disfavored producers.

Kansas, like other important oil and gas producing states, has by statute established a regulatory system designed to prevent waste in the production of oil and gas and to protect the correlative rights of the owners of producing properties. The system is administered by the State Corporation Commission. Pursuant to this regulatory plan the State Corporation Commission from time to time sets a production allowable for each gas field on the basis of economic and conservation standards, and each month issues a proration order making an allocation of allowables among the wells in each field on the basis of relevant engineering factors.[1] (R. 58-62). The effect of this action is to set an upper limit on the amount of gas that may be produced from each well. At the time of the promulgation of the orders involved in this case, however, there was no requirement in any regulation of the Kansas Commission that the amount of gas produced or taken from any one well bear any relationship to that produced or taken from any other well in the same field.

Appellant, a "natural gas company" within the meaning of the Natural Gas Act, has for many years taken gas from the wells of numerous producers in the Kansas Hugoton Gas Field. (R. 70, 75-76) For some time prior to the promulgation of the orders at issue in this case, appellant had been taking from some 144 wells of one favored producer in that field, Republic Natural Gas Company (hereafter "Republic"), a percentage of the allowables of those wells far higher than the percentage of the allowables that

[1] The validity of the Kansas allowable and proration orders is in no way involved in this case.

it was taking from the more than 1100 wells of all other producers in the same field with which it was connected.[2] (R. 32-34, 99)

On May 27, 1959, the Kansas Corporation Commission issued an order reciting that it had become apparent that appellant had not been taking ratably from its connections and directing that a hearing should be held to determine whether appellant should be required to take ratably from those connections. (R. 66-67) A hearing was held at which evidence was presented that as a result of appellant's failure to take ratably, drainage across lease lines had occurred and the correlative rights of producers other than Republic were being injured and prejudiced by an escape of gas from their leases to those of Republic.[3] (R. 80-85, 88, 93-94)

On October 7, 1959, the State Corporation Commission, having heard this and other testimony, ordered appellant to take gas ratably from all wells to which its pipeline system is connected in the Kansas Hugoton

[2] For example, in 1959 appellant's takes from the favored wells amounted to 86.19% of their allowables while its takes from its other connections were only 53.61% of allowables. (F.P.C. Memorandum, Appendix D, p. 55, collecting data from Kansas Corporation Commission Monthly Proration Reports)

[3] An expert witness testified: "In comparing that we see that Northern Natural Gas Company, excluding Cities Service Oil Company and Republic "A" connections, had 522.09 (percent underproduction); Republic Natural Gas Company (Group "A"), 4.29; and with the Cities Service Oil Company's connections, 547.36 percent. To have everything ratable here, each one of these figures should be around 425.77 percent underproduced. • • • I have expressed an opinion that there is drainage occurring. Our studies indicate that if the wells are produced with the same percent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected." (R. 33)

Gas Field. (R. 99-101) Subsequent thereto, and after due notice and hearing, the Commission issued an order and accompanying rule, effective February 8, 1960, directing every purchaser of gas in Kansas, including appellant, to take gas ratably from its connections in each common source of supply under proration by the Commission. (R. 14-18) These actions were taken pursuant to the express direction of the Kansas statute that the Commission "shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in such common source of supply." (G.S. 1961 Supp. 55-703; and see Finding 2 at R. 16)

Appellant sought judicial review in the District Court of Finney County, Kansas. On April 8, 1960, that court affirmed the Orders and Rule of the State Corporation Commission. (R. 26, 112) Thereafter the Kansas Supreme Court affirmed both the lower court's decision upholding the validity of the Commission's order requiring appellant to take gas ratably in the Kansas Hugoton Field (R. 157-175) and the lower court's decision upholding the validity of the Commission's Order and Rule directing all purchasers of natural gas to take gas ratably from each common source of supply under proration in Kansas. (R. 36-41) Appellant's motions for rehearing in the Kansas Supreme Court were denied. (R. 44, 187-189) On May 28, 1962, this Court noted probable jurisdiction.

Because the position taken by appellant as to the validity of the Kansas orders is largely, and that of the Federal Power Commission exclusively, based on the terms and consequences of certain contractual arrangements between appellant and various producers in the Kansas Hugoton Field, it is appropriate here briefly to describe the nature of those contracts, which have been filed with the Federal Power Commission as rate schedules.

On December 21, 1945, appellant as buyer, and Republic as seller, executed a gas purchase contract covering certain gas reserves in the Kansas Hugoton Gas Field. (R. 70-73, 115-156) The 1945 contract was amended by the parties on June 30, 1953. (R. 70) The basic contract of December 21, 1945, as amended in 1953, will hereafter be referred to as the "Republic A contract" and the wells covered by the contract as the "Republic A wells". That contract contains a so-called "take or pay" provision requiring in substance that appellant is to take from the Republic A wells that volume of gas necessary to supply 60% of the requirements of appellant's Omaha district, or pay for that volume of gas even if not taken. (R. 115-120, esp. Section 5 at R. 120) The contract also contains a provision which expressly subjects the rights of the parties to all present and future valid orders, rules and regulations of any regulatory body of the state or federal government. (Section 2 at R. 136)

At various times from 1938 to the present appellant has also entered into gas purchase contracts for additional supplies of gas in the Kansas Hugoton Field with various other producers. (R. 75, 76-78) All of these contracts with producers other than Republic

provide for ratable taking as among those producers, but not as between those producers and Republic.[4]

By 1947 the quantity of gas provided for by the take or pay provisions in the Republic A contract had come to exceed the allowables assigned by the Kansas Corporation Commission to the Republic A wells. (R. 74) This situation led to litigation, and in *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708, 720 (1952), the Supreme Court of Kansas ruled that the Republic A contract was necessarily subject to allowable orders issued by the State Corporation Commission. Accordingly, the court held that appellant was contractually obligated to take from the Republic A wells only the amount of the allowables assigned to those wells even if that amount was smaller than the amount of gas specified in the contract, and that appellant incurred no liability under the take or pay provisions for failing to take gas in excess of the allowables.

Although appellant was thus relieved by operation of Kansas law from part of its contract obligation to Republic, it nevertheless thereafter began to take from its other connections in the Kansas Hugoton Field a far smaller percentage of their allowables than it took from its Republic A connections. This situation resulted in the promulgation by the Kansas Corporation Commission of the orders involved in this case.

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[4] See, for example, the ratable take provisions in appellant's contract with Cities Service Oil Company, which are typical of those in all of the contracts under which appellant buys gas in the Kansas Hugoton Field other than the Republic A contract. (R. 76, 77-78)

SUMMARY OF ARGUMENT

I

The Kansas orders are an exercise of state power that protects the correlative rights of landowners and producers by requiring ratable taking. They do not fix or otherwise establish prices, or require natural gas companies to purchase any particular amount of natural gas. The Natural Gas Act does not deprive the states of the power to order ratable taking. At the time of the passage of the Natural Gas Act the states possessed the authority to require ratable taking to prevent the impairment of correlative rights. See *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 185. It is well settled that when Congress enacted the Natural Gas Act it did not intend to deprive the states of this or any other power in the field of natural gas regulation that they were then deemed to possess under the Constitution. See, *e.g.*, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684, 685-687; *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503, 512-513.

The fact that the orders read upon purchasers rather than producers does not make the orders invalid under the Natural Gas Act. That is a matter of form that should not be allowed to obscure the real character of the orders. Since the production of natural gas (its withdrawal from the ground) and its taking for interstate commerce are a single transaction, an order for ratable taking is in substance a regulation of production. The orders are addressed to the takers of natural gas because that is the most feasible method of assuring ratable production and protecting correlative rights, and because the contracts of appellant and other purchasers of gas in the Kansas Hugoton Field in effect

give them the power to control production. And in any event, the label applied to the orders is immaterial because no matter how described they do not invade any area reserved exclusively to Federal authority. It is not true that any state regulation that impinges in any way upon interstate sales of natural gas is invalid under the Supremacy Clause. The question is, rather, whether the exercise of the state power in question is actually inconsistent or in conflict with particular authority of the Federal Power Commission. A particularized consideration of the provisions of the Natural Gas Act cited by appellant demonstrates that appellant's claims of conflict are not well founded. The two Kansas orders do not conflict with or impair the authority of the Federal Power Commission to fix prices for gas sold in interstate commerce for resale, to control the terms and conditions of such sales, to grant certificates of convenience and necessity for the interstate transportation or sale of natural gas, or to exercise any of the other powers conferred upon the Commission by the Natural Gas Act.

The Federal Power Commission has recognized that the Natural Gas Act does not give it the power to protect correlative rights by ordering ratable taking. Accordingly, a holding that the Natural Gas Act precludes the states from protecting correlative rights by requiring the ratable taking of gas by purchasers in interstate commerce would create a regulatory gap, contrary to the teachings of this Court.

II

The remaining question is whether even if the Kansas orders are the kind of state regulatory action that would ordinarily be valid, they are invalid as applied

to appellant in this case because of the special contractual relations that exist between appellant and various producers of natural gas in the Kansas Hugoton Gas Field and elsewhere. Appellant and the Federal Power Commission both contend that because of the "take or pay" or "minimum take" provisions of many of these contracts, obligating appellant to pay for a certain minimum quantity of gas whether or not it takes that quantity, appellant can comply with the Kansas orders only by taking and paying for more gas than it wants or by incurring contractual liability to various of its suppliers. It is urged that this will result in an increase in the price of gas to the ultimate consumer and that for this reason the orders are inconsistent with the Natural Gas Act.

The orders are valid even on the assumption that compliance with them may, because of appellant's contracts, require appellant to pay for gas that it does not take. The argument to the contrary inverts the accepted legal principle that regulatory action controls private contracts by asserting that here it is the private contracts that control regulatory action. It cannot be seriously urged that the validity of state regulation is to be measured simply by whether it may affect the cost of gas to the ultimate consumer. Any state conservation measure may have this effect yet it cannot be argued that such measures are invalid under the Natural Gas Act. The test of the validity of state natural gas regulation is whether it interferes with particular regulatory powers granted to the Federal Power Commission. In this case the Federal Power Commission retains plenary authority to prevent, if it sees fit, the very consequences that are said to invalidate the Kansas orders. The Commission

could, if the public interest were deemed so to require, prevent appellant from passing on to its customers any increased cost incurred as a result of its special contractual provisions. The Commission also asserts authority to modify or cancel take or pay provisions in proceedings under Section 5 of the Natural Gas Act, and to deal with such provisions in Section 4 or Section 7 proceedings. These powers are not impaired by the Kansas orders and there is thus no need to invalidate the orders, and disregard the legitimate state interests which they serve, in order to vindicate any Federal interest that may exist in the premises.

There is no merit in the argument of appellant and the Power Commission that the orders are invalid because the "motive" of the Kansas Commission in issuing them was "to exert leverage on interstate pipe line companies to increase their takes from Kansas wells". First, the question of motive is irrelevant if the state, as here, is exercising power that is otherwise within its competence. See, *e.g.*, *Stephenson* v. *Binford*, 287 U.S. 251, 276. Second, the authority claimed by the Federal Power Commission is, as shown above, ample to prevent any consequences that the state orders might otherwise have in exerting the alleged "leverage". Finally, the argument is based upon inferences essentially derived not from the orders here at issue, or from the record in this case, but rather from entirely separate proceedings and orders relating to the setting of field allowables, whose validity is now before the Kansas Supreme Court and which this Court should not undertake to pass upon at this time.

ARGUMENT

The Kansas orders whose validity is at issue in this case simply provide that every purchaser of gas in a common source of supply in the State of Kansas is to take gas ratably from the wells to which it is connected in that common source of supply. They do not discriminate between purchasers of gas for resale in interstate commerce and other purchasers. They do not direct or require any purchaser to take any particular volume of gas—or indeed any gas—from Kansas producers as a group or from any particular Kansas producer. They do not fix or establish the price to be paid for any gas. In short, they amount to nothing more than an exercise of the State's power to protect correlative rights by requiring ratable taking and do not unlawfully impinge upon any regulatory area forbidden to the states by the Natural Gas Act or the Commerce Clause.

The Kansas orders are attacked on two grounds: First, appellant argues that because the orders read on purchasers rather than producers they are *ipso facto* a regulation of sales in interstate commerce for resale and hence are invalid under the Natural Gas Act because that statute gives the Federal Power Commission "exclusive jurisdiction" to regulate such sales. In the second place both appellant and the Federal Power Commission argue that even if the Natural Gas Act does not under ordinary circumstances deprive a state of the power to order ratable taking of natural gas there are in the instant case special circumstances that make the Kansas orders invalid as applied to appellant. These special circumstances are said to arise because appellant has by contract with a particular favored producer in the Kansas Hugoton Field under-

taken to take, or to pay for even if not taken, a certain quantity of natural gas from its connections with that producer. It is argued that because of this private contractual arrangement, the effect of the Kansas orders will be to force appellant either to increase its total purchases of gas in the Kansas Hugoton Field and decrease its purchases in other states, thereby incurring contract penalties to producers in those other states, or to reallocate its purchases in the Kansas Hugoton Field, thereby incurring contract penalties to Republic. It is asserted that either of these results will increase the cost of natural gas to the consumer and accordingly conflict with the Natural Gas Act.

There is no merit in either of these arguments.

I

The Natural Gas Act Does Not Deprive the States of Authority to Require Ratable Taking by Purchasers of Natural Gas

Appellant's first argument—that a state ratable take order necessarily invades an area forbidden to the states under the Natural Gas Act if it reads on purchasers of natural gas in interstate commerce for resale—ignores a long course of history. It is well settled that when Congress enacted the Natural Gas Act in 1938 it did not intend to deprive the states of the powers in the field of natural gas regulation which they were then deemed to possess under the Constitution. Rather, the Natural Gas Act was intended only to fill the "gap * * * thought to exist at the time the Natural Gas Act was passed" by providing for Federal regulation of those aspects of the natural gas business which the states were at that time believed to be con-

stitutionally incapable of regulating. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684, 685-687. As was specifically stated in the House Committee Report on the bill (H.R. Rep. No. 709, 75th Cong. 1st Sess., p. 2) "The bill takes no authority from state commissions, and is so drawn as to complement and in no manner usurp state regulatory authority * * *." See also *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 517 ("The Act, though extending federal regulation, had no purpose or effect to cut down state power"); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464; *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503, 512-513; *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690.

At the time of the passage of the Natural Gas Act, it had long been firmly established that the authority of the states to insure by appropriate regulation the prevention of drainage and waste and the impairment of correlative rights of owners of natural gas resources could be exercised consistent with the Federal Constitution. *Patterson* v. *Stanolind Oil & Gas Co.*, 305 U.S. 376; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 76-77; *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 22; *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210; *Walls* v. *Midland Carbon Co.*, 254 U.S. 300, 323; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61; *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190. And this Court has specifically held that this established authority included the right to require ratable taking. In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 185, the Court said:

> "This Court has upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking. *Champlin Refining*

Co. v. *Corporation Commission*, 286 U.S. 210 (1932) * * *."[5]

Because prior to the passage of the Natural Gas Act the states were recognized to have the authority to require ratable taking by purchasers of gas from common sources of supply, and because that Act did not deprive the states of this preexisting authority, there is no basis for appellant's argument that a ratable take order that reads on interstate purchasers of natural gas must be inconsistent with the Natural Gas Act. Indeed, precisely the opposite result follows from the authorities and principles discussed above.[6]

Appellant argues, however, that because the Kansas orders read on purchasers rather than producers of natural gas, they constitute a regulation of interstate sales of natural gas rather than of production and for that reason necessarily invade the authority reserved to the Federal Power Commission under the Natural Gas Act, urging that this Court has held that the Commission has exclusive and plenary jurisdiction over sales of natural gas in interstate commerce for resale.

The fact that in form the Kansas ratable take orders are addressed to purchasers and not to producers should not be allowed to obscure their real character. The production of natural gas (its withdrawal from

[5] Although the *Peerless* case was decided in 1950, the quoted passage refers to the constitutional powers of the states before the passage of the Natural Gas Act, as is shown by the Court's citation of the *Champlin* case which was decided six years prior to the passage of the Act.

[6] Most of the more important oil and gas producing states have long had statutes that provide for ratable taking to protect correlative rights. See, *e.g.*, Vernon's Texas Statutes Annotated, Title 102, Art. 6049a, Secs. 8, 8a (enacted in 1931); Oklahoma Statutes Annotated, Title 52, Sec. 240 (enacted in 1913); Louisiana Revised Statutes, 1950, Title 30, Secs. 41-46 (enacted in 1918). See also New Mexico Statutes Annotated, 1941, Ch. 69-214.

the well) and its movement into interstate commerce are a single physical operation. An order requiring ratable taking is therefore in every real sense tantamount to a regulation of the production of the wells involved.[7] That this is so is in effect admitted by the Federal Power Commission (F.P.C. Memorandum, p. 25) and the Commission has elsewhere recognized that state ratable take orders are in substance a regulation of production, and are not inconsistent with the Natural Gas Act. See *Deep South Oil Co.*, 25 F.P.C. 734, 737 (1961).[8]

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[7] An order directed to the taker of natural gas rather than to the producer is the most feasible regulatory method of providing for ratable taking. It is the taker and not the various producers who is in a position to know whether his takes from each of his connections in the field are such that the production of the wells is ratable. An order addressed simply to producers which required each producer to produce ratably with others with whose activities he was unfamiliar and over whose activities he had no control would create difficult and probably insoluble administrative problems.

It should also be observed that because appellant's contracts with its suppliers in the Kansas Hugoton Field give appellant the power to control production, appellant is in effect equivalent to a producer. Thus appellant's contract with Republic states that: "Northern shall have the right to regulate the rate of flow of gas from each well to the extent necessary to enable it to purchase the aggregate volumes of gas herein agreed to be purchased." (R. 151)

[8] Appellant urges that the exercise of state power here involved is invalid because the "production or gathering" exemption of Section 1(b) of the Natural Gas Act (15 U.S.C. § 717(b)) does not apply to sales of natural gas in interstate commerce for resale. As we have shown, however, the Natural Gas Act does not deprive Kansas of the power to regulate the taking of natural gas to prevent drainage and thus protect correlative rights, because that is a power that the State could constitutionally have exercised under the decisions of this Court prior to the passage of the statute. Whether this power be deemed to be explicitly preserved by the "production or gathering" exemption of Section 1(b) or whether it survives because it has not been overridden by any grant of Federal regulatory power is of no moment.

In any case, the label applied to the orders is immaterial. Whether they are described as a regulation of production or as a regulation of purchases, the orders do not invade the areas reserved to exclusive Federal authority. Appellant argues that the Federal Power Commission has exclusive and comprehensive power to regulate every aspect of sales of gas in interstate commerce, and that accordingly any state regulation that impinges in any way upon interstate sales is invalid under the Supremacy Clause. This assumption is incorrect. As this Court has noted in *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8:

> "* * * Congress, in enacting the Natural Gas Act, did not give the Commisson comprehensive powers over every incident of gas production, transportation and sale. Rather, Congress was 'meticulous' only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U.S. 507."[9]

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[9] The Court's citation of the *Panhandle* case in the quoted passage is particularly significant because appellant several times refers to a portion of the *Panhandle* opinion that speaks of the intention of Congress "to create a comprehensive and effective regulatory scheme." (Appellant's Brief, pp. 15, 18, 25) Any apparent inconsistency between these words and this Court's citation of the *Panhandle* case in *Transcontinental* disappears when one examines the entire passage in *Panhandle* from which those words have been extracted (332 U.S. at 520):

> "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority."

The status of an exercise of state power over natural gas is therefore not to be determined on the basis of any general assumption that the powers of the Federal Power Commission are comprehensive and exclusive but instead by a careful consideration of the nature of the state power exercised (*i.e.*, whether it was possessed by the states prior to passage of the Natural Gas Act) and of the question whether the exercise of the state power is actually inconsistent or in conflict with the power of the Federal Power Commission. The Kansas orders satisfy these tests. As we have shown above, a ratable take order is an exercise of constitutional power that was possessed by the states prior to the passage of the Natural Gas Act. And as we shall now show, the Kansas orders are not inconsistent or in conflict with the regulatory powers of the Federal Power Commission.

An exercise of state power does not conflict with the Natural Gas Act merely because it impinges upon or affects sales of gas in interstate commerce. For example, a state proration order may directly and substantially reduce the amount of gas available for delivery under a contract of interstate sale; yet it cannot reasonably be argued that for that reason such a state order is invalid under the Natural Gas Act.[10] This Court has recognized that under the Natural Gas Act

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[10] Indeed appellant in a document filed with the Federal Power Commission in another proceeding, which is set forth in Appendix G to the Memorandum of the Federal Power Commission (pp. 61, 67), points out that its obligation to purchase gas under contracts that have been filed with the Federal Power Commission "in many instances has been altered by the proration of production by state regulatory agencies, whereby the volume of gas to be purchased is determined by standards other than as written in the contract."

the states retain power to regulate matters of local concern even though in doing so they may to some degree affect or touch upon subject matter regulated by the Federal Power Commission. Thus, this Court has held that a state may validly require a natural gas company to obtain a certificate of public convenience and necessity before making direct sales of natural gas to industrial consumers even though the facilities used in making the sales are also subject to certification by the Federal Power Commission. *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329. See also *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507. The principle of these cases is merely an application of the general rule that state regulation of matters of local concern is not invalid under the Supremacy Clause merely because it relates to subject matter which is also subject to regulation under a federal statue. See *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440; *Buck* v. *California*, 343 U.S. 99, 101-102.

Appellant's claims of inconsistency and conflict between the Natural Gas Act and ratable take orders reading on natural gas purchasers are therefore not to be evaluated on the basis of mere generalizations, but rather in light of a particularized consideration of the provisions of the statute.[11] On this basis, it becomes evident that appellant's arguments are not well founded. Appellant refers specifically to Sections 1, 4, 5, 7 and

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[11] See *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 744: "* * * this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.'" See also *Kelly* v. *Washington*, 302 U.S. 1, 10.

16 of the statute. None of these sections advances appellant's position.[12]

Section 1, for example, provides, so far as is here relevant, that "The provisions of this act shall apply * * * to the sale in interstate commerce of natural gas for resale * * *." The section does not specify the nature or the extent of the authority of the Federal Power Commission over such sales. The scope of that authority, and the degree to which the states are precluded from exercising authority which may affect particular aspects of such sales, must necessarily be determined by reference to other provisions of the Act. The same is true of Section 16, which merely confers authority upon the Commission to make rules and regulations as to matters falling within its regulatory power. That provision does not in any way indicate the extent or nature of the Commission's regulatory power. Accordingly, it is clear that neither of these sec-

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[12] The same broad attack upon the validity of a state ratable take order that is made by appellant here was made by a natural gas company and rejected by this Court in *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas*, 302 S.W.2d 238 (Tex. Civ. App. 1957), *appeal dismissed*, 358 U.S. 37. That case involved the validity of a ratable take order issued by the Texas Railroad Commission in the Puckett-Ellenburger Gas Field. Permian's purchases of natural gas in the field were made under contracts on file with the Federal Power Commission and the prices established in the contracts were subject to Federal regulation. Permian contended, *inter alia*, that the Texas order conflicted with the Natural Gas Act and was therefore invalid. This argument was rejected by the Texas court and Permian appealed to this Court. The Texas Railroad Commission filed a motion to dismiss for want of a substantial Federal question and the motion was granted.

tions produces the conflict or inconsistency urged by appellant.[13]

Nor is such inconsistency or conflict found in relation to the authority over prices conferred upon the Commission by Sections 4 and 5 of the Natural Gas Act. The Kansas orders do not fix or establish rates, and accordingly cases cited by appellant such as *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44, holding that the Commission has exclusive jurisdiction to regulate the price of gas sold in interstate commerce for resale, are not in point.[14] There is likewise no merit in appellant's contention that the orders conflict with the authority of the Commission under the provisions mentioned because they direct appellant to take gas "in a manner or at a rate" contrary to the provisions of contracts that have been filed with the Power Commission as price schedules.[15] (Appellant's Brief, p. 19)

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[13] In support of its contention that the Kansas orders are inconsistent and in conflict with the Natural Gas Act, appellant cites a number of regulations issued by the Federal Power Commission under Section 16. Since the regulations cannot expand the statutory authority of the Commission the question of conflict between the Act and the Kansas orders must be resolved by reference to the substantive provisions of the statute. A review of the regulations cited by appellant shows that in fact they do not relate in any way to the ratable taking of gas, and that there is no conflict between the regulations and the Kansas orders.

[14] Appellant and the Federal Power Commission do not argue that the Kansas orders fix or establish rates; they do contend that because of private contractual arrangements that appellant has made with one supplier the effect of the orders will be to increase costs and that in time the increase in costs will be necessarily reflected in higher rates. This point is dealt with at pages 26-33, *infra*.

[15] Presumably appellant uses the word "rate" to denote the volume of gas taken since the Kansas orders do not fix or otherwise establish the price to be paid for any gas.

The fact that contracts have been accepted by the Commission for filing does not, as the Commission's own regulations show, mean that the Commission has approved all, or indeed any, of the terms and conditions contained therein. 18 C.F.R. §§ 154.23, 154.101.

Furthermore, appellant's contention that the Kansas orders direct it to take gas in a manner or at a rate different from those set out in its contracts is itself without substance. Nothing in any of those contracts purports to forbid appellant to take ratably from all of its connections in the Kansas Hugoton Field. Indeed, appellant itself states in its brief that from 1944 to 1958, a period during which it was purchasing under contracts with the same terms as those that it now claims to be inconsistent with ratable taking, its purchases from its connections in the Kansas Hugoton Field, were "substantially ratable." (Appellant's Brief, p. 10)

Finally, even were it to be assumed that the Federal Power Commission had affirmed or approved all the terms and conditions in appellant's contracts, and that the Kansas orders in fact do require appellant to take gas in a manner and at a rate different from those provided in the contracts, there would still be no conflict between the orders and the authority of the Federal Power Commission. Each of the contracts referred to contains a provision expressly making it subject to "all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction." (*e.g.*, R. 136) Accordingly, no state order can be held invalid simply on the ground that it "conflicts" with the terms and conditions of the contracts, because so long as the state order is not

invalid for some other, independent reason the contracts themselves provide for a resolution of any such conflict in favor of the order.

Appellant likewise makes no showing that the Kansas orders are inconsistent or in conflict with any authority conferred on the Federal Power Commission by Section 7 of the statute, dealing with the issuance of certificates of convenience and necessity. The Kansas ratable take orders do not direct the taking by appellant of any gas in a manner inconsistent with any obligation assumed by or imposed upon appellant by any certificate. Appellant points to no provision of any certificate that suggests the contrary, and here again it is surely significant that appellant claims that for a number of years prior to the promulgation of the orders it took from its connections in accordance with the ratable taking principle now set forth in the orders.

There is an additional reason why this Court should not hold that the Natural Gas Act precludes the states from protecting correlative rights by directing the ratable taking of gas by purchasers in interstate commerce. If states do not have this authority, then no regulatory agency does. The Natural Gas Act does not give the Federal Power Commission power to protect correlative rights by ordering ratable taking. That power is not expressly conferred on the Commission by any provision of the statute and it cannot be reasonably implied from any of the powers that are expressly conferred. The Commission itself has explicitly recognized that it has no such authority. *Lone Star Gas Gathering Co.*, F.P.C. Dkt. CP62-179 (Oc-

tober 17, 1962).[16] A decision that the Act deprives the states of authority to order ratable taking by purchasers for resale in interstate commerce would therefore create a gap in regulatory authority, a result contrary both to the expressed intent of Congress and to decisions of this Court. See *FPC* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 19, 28; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507.

II

The Kansas Orders Do Not Violate the Natural Gas Act as Applied to Appellant Because of Appellant's Special Contractual Arrangements

The remaining question is whether the Kansas orders, although the kind of state regulatory action that would be valid in ordinary circumstances, are invalid as applied to appellant in this case because of the special contractual arrangements that exist between appellant and its various suppliers in the Kansas Hugoton Field and elsewhere.[17] With respect to this as-

[16] The Commission in denying a motion for leave to intervene said:

> "Petitioner alleges that • • • in the event a certificate is granted to Lone Star, the reserves dedicated to Petitioner are in danger of being drained by Lone Star. • • •
>
> "The matters upon which Petitioner desires to be heard in this proceeding relate to the ratable production of natural gas, the correlative rights of producers and proration of production among producers producing natural gas from common reservoirs. We are of the opinion that these are matters which lie within the sphere of state control and cannot constitute a basis for intervention in the proceedings before the Commission."

[17] Appellant in this connection refers only to its contracts with producers in the Kansas Hugoton Field (Appellant's Brief, p. 28). The Federal Power Commission points also to appellant's purchase contracts in other states. (F.P.C. Memorandum, pp. 26-27)

pect of the case the contentions of appellant and the Federal Power Commission may be stated in essence as follows:

Appellant's Republic A contract, and its contracts with producers of gas in states other than Kansas, contain "take or pay" or "minimum take" provisions that obligate appellant to pay for a certain minimum quantity of gas at the contract price even if it takes less than that amount. To comply with the Kansas orders by taking ratably in the Kansas Hugoton Field, appellant, it is argued, would have to do one of two things: (1) increase its takes from its other connections in the field until they became ratable with its takes from the Republic A wells, or (2) continue to take the same amount from the field as a whole but reallocate its takes so as to make them ratable by decreasing takes from Republic to a figure below the amount provided by the contract and increasing takes from other wells. It is contended that the first of these courses would require appellant either to take from the Kansas Hugoton Field gas which it does not want and for which it has no present market or to reduce its takes in other fields and thereby incur contractual liability to producers in those fields, and that the second would result in contractual liability to Republic. Either course, it is argued, will necessarily cause an increase in the price of gas to the ultimate consumer, and for this reason the Kansas orders are inconsistent with the Natural Gas Act.[18]

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[18] Substantially the same arguments with respect to the effect of contractual arrangements on the validity of a state ratable take order were made in *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas*, 302 S.W.2d 238 (Tex. Civ. App. 1957), *appeal dismissed*, 358 U.S. 37. There Permian contended that it had take

We submit that the Kansas orders are valid even if it is assumed that compliance with the orders may require appellant to pay for gas not taken. It is familiar law that otherwise valid regulatory measures cannot be defeated by private contractual arrangements. See *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 357. No one would suggest that appellant could resist a state ratable take order simply on the ground that it had by private contract agreed to give preference to a favorite supplier. Yet, in effect, that is the result of the argument now advanced by appellant and the Federal Power Commission. The argument does not suggest that the effect of the contracts is to change the nature of the state power exercised; that power remains, irrespective of the contracts or their consequences, a power to protect correlative rights by requiring ratable taking. The argument simply asserts that even though the State possesses the power to protect correlative rights by requiring ratable taking, that power cannot be exercised as against appellant because of consequences that it is alleged will follow from appellant's private contract obligations. This is an argument that inverts the accepted legal principle that regulatory action controls private contracts by asserting that it is the private contracts that control regulatory action.

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or pay arrangements with one producer and that the effect of the Texas order would necessarily be to force it either to take less from the favored producer than required by contract, thereby subjecting it to potential liability to that producer, or to increase its purchases from other producers in the field to a level greater than its needs. See Jurisdictional Statement, No. 64, October Term 1958. This Court did not regard those arguments as raising any substantial Federal question.

In the instant case acceptance of the argument would produce bizarre results. Presumably the Kansas orders would be valid as applied to all natural gas companies in the Kansas Hugoton Field which do not have contracts discriminatorily favoring some of their connections as against others in the matter of ratable taking.[19] And presumably they would become valid even as to appellant if it should hereafter negotiate a contract with Republic containing no take or pay provision, or negotiate contracts with its other suppliers in the Kansas Hugoton Field that contain such provisions on a basis comparable to the Republic A contract.[20] The application of the Supremacy Clause to state regulation should not be permitted to turn upon such fortuitous circumstances.

In arguing that the alleged consequences of the application of the Kansas orders to appellant's private contracts are inconsistent with the Natural Gas Act, appellant and the Federal Power Commission do not handicap themselves by reference to any specific conflict between the orders and particular Federal regulatory powers. Instead appellant and the Power Commission simply assert that the consequences that they allege will follow from appellant's private contractual arrangements—a forced taking by appellant of increased quantities of gas from a state or the payment by it of contractual penalties—are inconsistent with the

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[19] The consequences complained of by appellant and the Federal Power Commission in this litigation arise, it should be noted, not simply because appellant's contract with Republic contains take or pay provisions, but only because that fact is coupled with the additional fact that appellant's other contracts in the field do not contain similar provisions on a comparable basis.

[20] Conversely, presumably other purchasers could render the orders invalid as to them simply by entering into contracts favoring one particular producer at the expense of other producers.

Natural Gas Act because they will lead to an increase in the cost of natural gas to consumers. The premise of this argument appears to be that the validity of state regulation under the Natural Gas Act is to be measured simply and solely by whether it may result in an increase in the cost of gas to the ultimate consumer and that this is so even if the power exercised by the state is one that the states possessed prior to the passage of the statute and even if there is no showing that the exercise of the power interferes with any specific authority conferred upon the Federal Power Commission. Nothing in the legislative history of the Federal Power Act, in its provisions, or in the decisions of this Court delineating the boundaries between state and Federal power under the statute provides any support for this premise. It is evident that any state conservation measure limiting the output of gas or regulating the spacing of wells may tend to affect the ultimate cost of gas, but it has never previously been suggested that such measures are for that reason invalid under the Natural Gas Act.[21] The premise of the argument advanced by appellant and the Power Commission, if accepted, would impair, if not destroy, the dual and complementary plan of regulation that the Natural Gas Act was intended to establish.

The argument of the Federal Power Commission and appellant is defective for still another reason. It assumes that if appellant incurs increased costs as a result of being required to take ratably in the Kansas Hugoton Field those costs must necessarily be passed on to consumers. This suggestion overlooks the fact

[21] We do not suggest that such measures invariably increase the cost of gas to the ultimate consumer. In the long run the effect of the measures may well be to decrease the cost of gas. The point is that the validity of these state measures does not turn upon whether they have any effect on the ultimate cost of gas.

that the Federal Power Commission concededly has broad rate-making powers which can be utilized for the purpose of protecting consumers. In the instant case there is no reason why the Commission could not require appellant itself to bear any additional cost incurred because of a contract provision which, although perhaps improvident, was voluntarily accepted by it.[22] It is clearly within the power of the Commission to determine that it is not in the public interest to permit appellant to pass on this cost

[22] It should be noted that the Federal Power Commission's statements to the effect that appellant will incur increased costs by virtue of the Kansas orders, and its calculations as to the amount of these costs, themselves suffer from basic infirmities. In the first place, those statements and calculations are not based upon any material of record in this case but rather on statistics contained in a tabulation filed by appellant with the Federal Power Commission in an unrelated proceeding. (F.P.C. Memorandum, p. 63) Furthermore, contrary to the Federal Power Commission's assertion that these statistics measure appellant's contractual obligations to take gas (F.P.C. Memorandum, p. 27), in fact the statistics provide no basis for any determination as to the extent of appellant's contractual obligations. Appellant itself in explanatory notes to the tabulation makes it plain that the volumes of gas stated are not necessarily volumes that appellant is required by contract to take or to pay for but instead states that "in Northern's judgment, the volumes of gas listed in this volume are *within practical and reasonable limits of prudent operations* or for reasons beyond the control of Northern, the minimum volumes required to be purchased during the calendar year 1960." (F.P.C. Memorandum, p. 67) (Emphasis added.) And even if the statistics relied upon did purport to reflect appellant's contractual obligations, they would not be informative because they fail to disclose instances where any contractual obligation on appellant's part to take a particular minimum quantity of gas is qualified by the common form of "makeup" provision which gives the purchaser of gas a grace period to take gas previously paid for but not taken. To the extent that appellant is in a position to take advantage of provisions of this kind, it need not pay for gas not taken and thus will incur no additional expense by reason of any take or pay obligation.

to its customers. Compare *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355.[23]

Furthermore, it may be noted that the Commission has claimed the authority to deal with a take or pay provision in a proceeding under Section 5 of the Act. See *Mississippi River Fuel Corp. v. FPC*, 252 F.2d 619, 626 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 904. If this claim of authority is to be regarded as valid the modification or elimination of the take or pay provisions in appellant's contracts could be required by the Commission in a Section 5 proceeding, assuming of course that the record before the Commission in that proceeding justified a finding that the change was in the public interest.[24]

[23] Even if it should be assumed that any additional expense incurred by appellant as a result of the take or pay provisions is a legitimate cost of service, and that the Federal Power Commission's assertions as to the amount of that additional expense are accurate (but see note 22, *supra*), it would by no means follow that an expense in that amount would be borne by ultimate consumers. The Federal Power Commission, in discussing the additional expense that appellant would incur if it had complied with the Kansas orders in the year 1970 by increasing its takes from its other connections in the Kansas Hugoton Field and decreasing its take from Republic, asserts: "This increase in cost to Northern, and ultimately to Northern's consumers, would have been $750,259.00." (FPC Memorandum, pp. 29-30). The impression created by such statements is misleading. The rate-making process is not so merely mathematically an exercise that every increase in costs that are properly entitled to consideration in determination of a fair return is automatically reflected by an allowance by the Commission of an increased rate. Except in the context of a particular rate proceeding, any assertion about the effect that an increase in one item of cost will have on the Commission's determination of a reasonable rate of return and on the prices that the Commission will ultimately find to be just and reasonable is wholly speculative and problematical.

[24] Compare *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344-345, where the Court pointed out that: "• • • the contracts remain fully subject to the paramount power of the

Nor is the Commission's claim of authority over such provisions restricted to Section 5 proceedings. The Commission has also claimed the power under Section 4 to require the modification or removal of such a provision if it is sought to be introduced into a pre-existing contract. See *State Corporation Commission of Kansas v. FPC*, 206 F. 2d 690, 717 (8th Cir. 1953). And in the case of any new operation or service the Commission, under Section 7, has taken the position that it has the authority to require the removal or modification of a take or pay provision in a proposed contract as a condition to the granting of a certificate of convenience and necessity. *Transwestern Pipeline Co.*, 22 F.P.C. 391, 395 (1959); see also Notice of Proposed Rulemaking, 26 Fed. Reg. 4615 (May 26, 1961).[25]

Commission to modify them when necessary in the public interest. • • • Thus, while natural gas companies are understandably not given the same explicit standing to complain of their own contracts as are those who represent the public interest or those who might be discriminated against, there is nothing to prevent them from furnishing the Commission any relevant information and requesting it to initiate an investigation on its own motion."

Since any Section 5 proceeding directed to the take or pay provisions in appellant's contracts with Republic would involve simply that provision and would not require a review of an entire rate structure, there is no reason to suppose that the proceeding would involve any substantial delay.

[25] In this rule-making proceeding (F.P.C. Dkt. R-199) the Federal Power Commission has proposed to amend its Statement of General Policy by adding provisions stating that certain kinds of take or pay provisions in contracts for the transportation or sale of natural gas shall be inoperative and of no effect at law. The Kansas Corporation Commission has filed comments objecting to the adoption of the general rule proposed on the ground that it might impair the power of the states to regulate production, conserve natural resources and protect correlative rights. The comments do not, however, question the authority of the Federal Power Commission to modify or to eliminate take or pay provisions from a specific gas purchase contract on the basis of a record showing that in the particular case the modification or elimination is in the public interest.

In short, the position heretofore taken by the Federal Power Commission as to its authority necessarily leads to the conclusion that if the Kansas ratable take orders are deemed to produce consequences which cause the continuation of take or pay provisions in appellant's contracts to be not in the public interest, the Federal Power Commission has ample authority to deal with those consequences without impairing the effectiveness of the state orders. There is therefore no need to invalidate the state orders and thus disregard the legitimate state interest which they serve in order to vindicate any federal interest that may exist in the premises. On the contrary, a decision upholding the validity of the Kansas orders will at the same time leave unimpaired the Federal Power Commission's authority to deal with the alleged consequences that are said to be inconsistent with the Natural Gas Act and will thus implement the "comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority," which this Court has said it was the purpose of the Congress to create. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 520. Indeed since the Commission has, on its own view, plenary authority to deal with the only potential consequences of the Kansas orders that cause it to challenge them, there is even less basis for invalidating the orders than there would be for striking down the kind of state conservation measures, involving well spacing and the like, that appellant concedes to be valid. (Appellant's Brief, p. 19)

Appellant and the Commission both urge that the motive of the Kansas Commission in issuing the orders here in issue was "to exert leverage upon inter-

state pipeline companies to increase their takes from Kansas wells." (F.P.C. Memorandum, pp. 18-19) Three points may be made as to this line of argument.

First, the argument is based upon inferences essentially derived not from the orders here at issue, or from the proceedings in which they were entered, but rather from entirely different and separate proceedings before the Kansas Corporation Commission. In those proceedings, in determining allowables for the Kansas Hugoton Field, the Commission decided that it would make its own independent determination of market demand and appropriate total allowables and would not be bound by the nominations made by appellant and other takers of gas. The validity of this action of the Kansas Commission in fixing allowables is not involved in this case but is at issue in cases now pending before the Kansas Supreme Court.[26] The record on which the Commission acted in taking that action is not before this Court. It is assumed that this Court will not seek to determine the motives of the Kansas Commission in taking the action in the absence of that record and in advance of any determination of the questions involved by the Kansas court.

Second, these speculations as to motive are in any case irrelevant because it is well settled that if a state regulatory agency exercises power that is otherwise within its competence—here the power to require ratable taking and protect correlative rights—the exercise cannot be attacked on grounds of motive or on the

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[26] *Colorado Interstate Gas Co.* v. *State Corporation Commission*, Case Nos. 41515, 41516, 41555, 41556; *Southwestern Kansas Royalty Owners Association* v. *State Corporation Commission*, Case No. 42038; *Colorado Interstate Gas Co.* v. *State Corporation Commission*, Case No. 42185; *Northern Natural Gas Co.* v. *State Corporation Commission*, Case Nos. 42175, 42176 and 42230.

ground that it was in part designed to further purposes which, considered alone, the state has no constitutional power to effect. *Stephenson* v. *Binford*, 287 U.S. 251, 276; *Amy* v. *Watertown*, 130 U.S. 301, 319; *Soon Hing* v. *Crowley*, 113 U.S. 703.

And finally, as we have shown, the Federal Power Commission's own position is that it has ample authority to prevent any consequences that the state orders might otherwise have in "exert[ing] leverage upon interstate pipeline companies to increase their takes from Kansas wells." It is hardly in any position to argue, therefore, that the orders should be invalidated —and appellant thus permitted to ignore the correlative rights of Kansas landowners and producers—on the ground that the alleged "leverage" was one of the hoped-for results of the orders.

The attack on the validity of the Kansas orders discussed in this section of our brief rests entirely upon the assumption that appellant's obligations under the take or pay provisions of the Republic A contract are not, as a matter of contract law, superseded or modified by the orders.[27] Appellant itself, however, asserts that this assumption is incorrect and contends that the orders if valid modify its contractual obligations.[28] If

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[27] The Federal Power Commission expressly concedes that if the take or pay provisions in appellant's Republic A contract are superseded or modified by the Kansas orders those orders would not be invalid under the Natural Gas Act. (F.P.C. Memorandum, pp. 20, 21-22)

[28] Thus appellant states in its brief (page 29) "• • • • it is Northern's position that in the event the challenged regulations should herein be determined to be valid, necessarily the contract obligations would have to yield thereto • • •". See also appellant's statement in the Supplement to Application in F.P.C. Dkt. CP62-85, printed as Appendix G to the Memorandum of the

this Court should be of the view that the validity of the Kansas orders depends upon whether they supersede or modify appellant's contractual obligations then we concur in the suggestion of the Federal Power Commission that the case should be remanded to the Supreme Court of Kansas for decision of that antecedent question of state law.

We submit, however, that this would not be a proper disposition of this case and that there is no need for any remand. As we have shown above the validity of the Kansas orders is not controlled by appellant's private contract obligations, and the orders are equally valid whether or not they are assumed to supersede or modify those obligations.

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted,

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November 19, 1962

Federal Power Commission, that "It is Northern's • • • position that the 'ratable take' orders issued by the Kansas Corporation Commission limit the volume of gas Northern may lawfully purchase from the wells under this Contract to such wells' ratable share of Northern's actual market requirements from this Field." (F.P.C. Memorandum, p. 67)

APPENDIX A

Statutes Involved

KANSAS G.S. 1961 Supp. 55-703 provides:

"Production regulations; rules and formulas. Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: Provided, however, That the daily takes of gas from any well in an unprorated gas pool shall not exceed twenty-

five percent (25%) of its open flow: Provided further, however, That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand."

KANSAS G.S. 1949, 55-704 provides:

"Rules and regulations authorized; notice and hearings. The commission shall promulgate such rules and regulations as may be necessary for the prevention of waste as defined by this act, the protection of all water, oil or gas-bearing strata encountered in any well drilled in such common source of supply, ascertaining the several factors entering into the determination of the productive capacity of each well, the total productive capacity of all wells in the common source of supply, the establishment of such other standard or standards as the commission may find proper to determine the productive capacity of each well and of all wells in such common source of supply, and as the commission may find necessary and proper to carry out the spirit and purpose of this act: Provided, however, That notice, as provided in section 8 [55-706] of this act, shall be served upon or given to the producers and purchasers of natural gas and all other persons, firms or corporations interested, of any hearing or hearings which may be called for the purpose of establishing any facts upon which any proposed rule or regulation may be based."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 62

NORTHERN NATURAL GAS COMPANY,
Appellant,

vs.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Appellee,

Appeal From the Supreme Court of the State of Kansas

BRIEF OF AMICI CURIAE OF THE STATES OF: TEXAS, ALABAMA, COLORADO, GEORGIA, ILLINOIS, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, UTAH, AND WYOMING

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 62

NORTHERN NATURAL GAS COMPANY,
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vs.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Appellee,

Appeal From the Supreme Court of the State of Kansas

This brief of amici curiae urging affirmance of Nos. 42,127 and 42,128, both styled Northern Natural Gas Company v. State Corporation Commission, 188 Kan. 351, 362 P. 2d 609, and 188 Kan. 355, 362 P. 2d 599, respectively, is filed on behalf of the States listed below by the Attorney Generals indicated. The States filing this brief, which are the principal oil and gas producing jurisdictions not directly involved in the present litigation, are vitally concerned with the outcome of this case because the very future of state regulation of oil and gas production is at stake. In the event this court now determines that states may not regulate oil and gas production if there is any possibility that such regulation may incidentally affect sales of gas in inter-

state commerce, the result will be to resubject the oil and gas industry to the economic chaos and attendant waste prevalent before passage of state proration statutes. Because of the extreme importance of the issues involved and because of their broad experience in the administration of proration statutes, the following States respectfully request permission to file this brief as amici curiae:

STATE	*ATTORNEY GENERAL*
Texas	Will Wilson
Alabama	MacDonald Gallion
Colorado	Duke W. Dunbar
Illinois	William G. Clark
Louisiana	Jack P. F. Gremillion
Mississippi	Joe T. Patterson
Nebraska	Clarence A. H. Meyer
Nevada	Charles E. Springer
New Mexico	Earl E. Hartley
North Dakota	Leslie R. Burgum
Okalhoma	Mac Q. Williamson
Utah	A. Pratt Kesler
Wyoming	W. M. Haight
Georgia	Eugene Cook
Montana	Forrest H. Anderson

Texas proration statutes and procedures and cases litigating these procedures have been used in this brief by way of example. While the applicable statutes and case laws of other jurisdictions joining in this brief are not necessarily identical to those of Texas, insofar as such statutes and laws form the background of proration and will be af-

fected by this case, the Texas materials are representative.

Statement of Facts

Prior to 1958 the State Corporation Commission of the State of Kansas, in accordance with the usual procedure of state regulatory bodies, established allowables in the Kansas-Hugoton Field by calculating the total demand for gas from the field on the basis of projected purchases nominated by all pipelines connected to the field. The Commission then prorated production from the various gas wells in the field to insure to each producer his fair share of the total market demand. Hearings held by the Commission in early 1958 revealed that reserves of Kansas producers were being systematically drained under established allowables because pipeline purchasers were making lower nominations (estimates of projected purchases) and were taking a much smaller percentage of reserves from Kansas than from Texas and Oklahoma portions of the field. (See memorandum for the Federal Power Commission as amicus curiae previously filed in this cause at page 4 thereof.)

Despite the fact that its markets were at the time inadequate to insure Kansas producers sufficient production to allow them their fair share of the gas in the Hugoton Field, Northern Natural Gas Company proceeded to acquire enormous additional reserves of gas (See testimony of Rex D. Fowler, Transcript p. 32). These acquisitions apparently were made upon the unwarranted assumption that

the Federal Power Commission would quickly allow expansion into new markets (Transcript p. 85). Northern Natural drastically reduced its already inadequate purchases from the Kansas-Hugoton Field in early 1958 (Transcript p. 32), presumably in order to avoid payment for gas not taken from the new reserves which it had acquired because of its oversanguine expectations.

Because of Northern Natural's discrimination against Kansas producers, the State Corporation Commission was compelled to alter its policy of relying solely upon pipeline nominations in setting allowables in the Kansas-Hugoton Field. As a consequence, in early 1958 new allowables were established which were more in line with Kansas' fair share of production from the field; that is to say more nearly proportional in comparison to reserves to the rate of production in Texas and Oklahoma. In establishing these allowables, the Commission was attempting to insure to each owner of oil and gas the opportunity to produce the oil and gas in place underneath the land which he owned.[1]

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[1] The Texas statute establishing the duties of the Texas Railroad Commission is Article 6008, Vernon's Annotated Texas Statutes, provides in part as follows:

"Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests:

"(a) In the prevention of waste as 'waste' is defined herein;

"(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such as permitted in this Article."

The increased allowables resulted in inequitable taking as among Kansas producers, however. Northern Natural Gas Company has connections with over 1200 wells in the Kansas portion of the field, but its only contract containing a "take-or-pay" provision is that with Republic Natural Gas Company. This provision requires Northern Natural to take a specified quantity of gas or to pay a determinable sum of money if that amount of gas is not taken.[1] In order to avoid having to pay under the terms of the Republic contract for gas not taken, Northern Natural took the entire allowable from the Republic wells, but underproduced all other Kansas wells to which it was connected. The owners were prevented from obtaining any additional market for the underproduced wells because their entire reserves were committed to contracts within the jurisdiction of the Federal Power Commission.

Reference to Northern Natural's Exhibit No. 7 put into evidence in the Commission hearing (Transcript p. 83), reveals the extent of Northern Natural's discrimination against all producers other than Republic Natural Gas Company. As of April 1, 1958, non-Republic wells were underproduced by one month's allowable, while by December 15th of that year, the wells were underproduced in the

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[1] Contrary to the situation suggested by the facts in this case, most gas purchase contracts involving sales into interstate commerce contain "take-or-pay" clauses. It has been held, however, that a purchaser is not required to pay under such a clause if taking the allowable production from the well or wells involved. See Northern Natural Gas Co. v. Republic Natural Gas Co., 172 Kan. 450, 241 P. 2d 708 (1952).

amount of five months' allowables. A rough computation demonstrates that only about one-half as much gas was taken from each of the non-Republic wells during the period as had been taken from each Republic well.

In order to prevent drainage as among Kansas owners while still allowing them to produce their fair share of the total gas in the reservoir, the Commission issued the ratable take order involved in this case. A ratable take order requires each purchaser to take gas from all wells to which he is connected in proportion to the allowables of the wells. It does not require the purchaser to take *any particular volume of gas* but only that his taking of gas must be *fairly apportioned* among the various wells to which he is connected. Thus, the purpose of the ratable take order was to implement state production regulations designed to protect the correlative rights of owners and producers of gas. In the absence of such an order, certain Kansas owners were grossly favored by Northern Natural over other owners in the same field. Since it is possible for a relatively small number of wells to drain a gas reservoir, those owners and producers discriminated against would ultimately lose by drainage much of the gas under their lands.

By means of the present scheme of regulation, during the calendar year of 1961 each of the Kansas producers connected to Northern Natural was able to produce at least 80 per cent of the gas to which he was entitled (See memorandum for the Federal Power Commission as amicus curiae previously filed

in this cause at page 3 thereof), while prior to issuance of the ratable take order most owners were able to produce less than 50 per cent of their fair share. Thus the ratable take order working in conjunction with appropriately established allowables has resulted in effective protection of correlative rights.

It is of especial interest that there is no evidence in this case that Northern Natural *has ever been obligated to pay for gas not taken* or *will ever be forced* by these reasonable orders. Thus, *what Northern Natural really seeks in this case is an unrestricted license to discriminate against some or all Kansas owners and producers of natural gas.*

Argument

THE NATURAL GAS ACT DOES NOT PRECLUDE STATE REGULATION OF PRODUCTION OF OIL AND GAS EVEN WHERE SUCH REGULATION MAY HAVE AN INCIDENTAL EFFECT UPON SALES OF GAS IN INTERSTATE COMMERCE.

1. *"Production or gathering" is specifically excepted from the application of the statute.*

Section 1 (b) of the Natural Gas Act [52 Stat. 821 (1938); 15 U.S.C. § 717 (b)] provides as follows:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas

companies engaged in such transportation or sale, but *shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or *to the production or gathering of natural gas.*" (Emphasis supplied)

In interpreting this language in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), the Court said: "There can be no dispute that the overriding congressional purpose was to plug the 'gap' in regulation of natural gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural gas business."

The right of states to regulate production and gathering of oil and gas for the purpose of preventing waste, protecting correlative rights, and preventing drainage was well established at the time the Natural Gas Act was passed, this right including the power to issue ratable take orders.[3] Conse-

[3] Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932). See also Summers, The Law of Oil and Gas (2d ed.) § 106, p. 174 and particularly the cases cited in note 44 to said section. Litigation in connection with Sections 8a and 8aa, Article 6049a, V.A.T.S., the Texas Statutes authorizing ratable take orders, is of especial interest. In 1932 an order under Section 8aa was held invalid as burdening interstate commerce because the order extended the Common Purchaser Statute to pipelines which were not common carriers. Texoma Natural Gas Co. v. Railroad Commission of Texas, 59 F 2d 750 (D.C. 1932). This court in Thompson v. Consolidated Gas Utilities Corp., 300 U.S.

quently, the above language of the National Gas Act should be read as excepting from the jurisdiction of the Federal Power Commission the regulation of gas production for the purpose of protecting correlative rights and preventing waste and drainage, even where such regulation has an incidental effect upon the amount of gas sold into interstate commerce under a given contract or upon the total price paid for its gas requirements by a given interstate pipeline purchaser. *Thus it was to allow exactly the type of state regulation complained of in this case that the "production or gathering" exception was incorporated into the Natural Gas Act.*

Appellant appears to rely principally upon the following three cases: *Phillips Petroleum Co. v. Wisconsin, supra; Natural Gas Pipe Line Co. v. Panoma Corp.*, 349 U.S. 44 (1955); and *Cities Service Gas Co. v. State Corp. Comm'n of Kansas*, 355 U.S. 391 (1958). The *Phillips* case, as shown above, plainly supports the construction of the Natural Gas Act urged in this brief. The other two cases cited deal with state attempts to fix the price of gas sold into interstate commerce. The orders there under attack did not regulate production or involve protection of correlative rights or prevention of drainage or waste.

55 (1936), at pages 78 and 79, lays especial emphasis upon the fact that in the Texoma case the pipelines were not common carriers, distinguishing the "Assigned Car Cases" upon that ground. A close reading of these two cases demonstrates that prior to the passage of the Natural Gas Act, ratable take orders issued under Section 8a were considered by the Federal Courts to be a valid exercise of state police power in the regulation of production of gas insofar as common carriers were concerned. See also discussion of the *Peerless* case below.

The true significance of the *Panoma* and *Cities Service* cases can be understood only in connection with *Cities Service Gas Co. v. Peerlees Oil & Gas Co., et al*, 340 U.S. 179 (1950). That case involved an order setting a minimum wellhead price and ratable take order. Cities Service was draining gas from reserves which Peerless was unable to produce for lack of a market. Cities Service refused to purchase any gas from Peerless except at a price which would have amounted to confiscation. Consequently, the Oklahoma Corporation Commission ordered Cities Service to connect with the Peerless wells and purchase the output ratably at a price fixed by the Commission. The orders were held not to be an unreasonable burden on interstate commerce.

The Court, in its discussion, upheld state ratable take orders in unequivocable terms: "The Due Process and Equal Protection issues raised by appellant are virtually without substance. It is now undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas. This Court has upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking, Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 76 L ed. 1062, 52 S. Ct. 559, 86 ALR 403 (1932), or to protect the economy of the state. Railroad Commission v. Rowan & Nichols Oil Co., 310 U.S. 573, 84 L ed. 1368, 60 S. Ct. 1021 (1940). These ends have been held to justify control over production even though the uses to which property may profit-

ably be put are restricted. Walls v. Midland Carbon Co. 254 U.S. 300, 65 L ed 276, 41 S. C. 118 (1920)."

The Court further held that incidental leverage on interstate pipeline purchasers would not invalidate such an order, saying: "A state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources. The contention urged by appellant that a group of private producers and royalty owners derive substantial gain from the regulations does not contradict the established connection between the orders and a state-wide interest in conservation. Cf. Thompson v. Consolidated Gas Co. 300 U.S. 55, 81 L. ed. 510, 57 S. Ct. 364 (1937)." The Court goes on to point out that *only* in connection with the *price fixing feature* of the *Peerless* case was the effect of the Natural Gas Act ignored: "Whether the Gas Act authorizes the Power Commission *to set field prices on sales* by independent producers, or leaves that function to the states, is not before this court." (emphasis supplied) The *Panoma* case, which is cited by the *Cities Service* case, distinguishes the *Peerless* case solely on the basis of the quoted language excluding the Natural Gas Act from consideration in connection with price fixing. Thus, the *Peerless* case and the interpretation of the *Peerless* case in the *Panoma* and *Cities Service* cases demonstrate the position of this court to be that an appropriate ratable take order is a valid regulation of gas production necessary to effective state regulation for purposes of conservation.

In summary, the real purpose of the "production and gathering" exception was to make certain that the Natural Gas Act did not interfere with effective state regulation for conservation purposes, including the protection of correlative rights. The cases cited, together with the facts of the instant case and of the *Peerless* case, demonstrate that effective protection of correlative rights can be achieved in certain situations only by issuance of appropriate ratable take orders. Ratable take orders have consistently been upheld by this court in the face of attacks on almost all conceivable grounds.

2. *Appellant's theory as to the effect of filing gas purchase contracts with the Federal Power Commission would make unworkable state regulation of oil and gas production.*

Over three-fourths of the oil produced in the State of Texas is produced in association with gas sold into interstate commerce. Because such associated gas cannot be produced without also producing the oil in which it is dissolved, state regulation of oil production must necessarily affect the amounts of gas sold into interstate commerce under the terms of various contracts properly filed as rate schedules with the Federal Power Commission and must have some effect upon the prices paid for their total gas requirements by interstate gas pipeline companies.

The only logical conclusion of Appellant's argument as to the sacrosanctity of each and every provision of contracts filed with the Federal Power

Commission as rate schedules is that any state order which *might possibly* increase the overall price paid by an interstate pipeline company for its requirements of gas would be void as in contravention of the authority of the Federal Power Commission under the Natural Gas Act. Since only a small fraction of oil and gas production would be subject to state control, no effective regulation of production of either oil or gas could be exercised by state regulatory bodies. That this result is absolutely contrary to the intent of Congress both prior and subsequent to the passage of the Natural Gas Act is demonstrated by the many Congressional resolutions in connection with the Interstate Oil Compact.[1]

3. *The construction argued by Appellant contradicts its position in connection with the effect of state established allowables on "take-or-pay" provisions.*

Appellant herein, by its reliance upon and acceptance of benefits under the judgment in the case of *Northern Natural Gas Co. v. Republic Natural Gas Co.*, 172 Kan. 450, 241 P. 2d 708 (1952), admits that a state proration order restricting allowables has the effect of reducing the required "take" under a "take-or-pay" provision even though the "take-or-pay" provision is contained in a contract properly filed with the Federal Power Commission as a rate schedule under the terms of the Natural Gas Act. Thus Appellant seems to reason that state

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[1] See for example H.R.J. Res. 407, 74th Cong., 1st Sess., 79 Cong. Rec. 14584 (1935); H.R.J. Res. 329, 76th Cong., 1st Sess., 84 Cong. Rec. 8980 (1939).

regulation *reducing* the sums. Appellant would, in the absence of such regulation, be obligated to pay is in no way in conflict with the Natural Gas Act, but that any regulation which might *possibly* have the effect of slightly *increasing* the costs of a gas pipeline company is in contravention of the Natural Gas Act.

Certainly Appellant can find no support for this position in the Natural Gas Act, which simply requires that "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful." [52 Stat. 822 (1938); 15 U.S.C. § 717c]

4. *Appellant's construction of the Natural Gas Act has already been negatived by the Permian case.*

There is no distinction between this case and the case of *Permian Basin Pipeline Co. v. Railroad Comm'n of Texas*, 358 U.S. 37 (1958). In that case the Railroad Commission of Texas entered orders having the effect of prorating the production of gas from the Puckett-Ellenburger Field and of requiring the pipeline company to purchase ratably from the operators in the field the gas so produced. These orders also had the effect of reducing the amounts of gas sold by Phillips Petroleum Company[5] under the

[5] Phillips Petroleum Company was declared by this Court to be a natural gas company subject to the provisions of the Natural Gas Act in Phillips Petroleum Co. v. Wisconsin, *supra*.

terms of its contracts with Permian. It was contended that these orders constituted a burden on interstate commerce and encroached on the jurisdiction of the Federal Power Commission. The orders were upheld by the Texas courts on appeal, and this Court dismissed application for writ of certiorari. In so doing, we submit that this Court implied that it did not view a state ratable take order incidentally affecting the amount or price of sales of gas into interstate commerce as violating the Natural Gas Act.

Conclusion

The States joining in this brief believe, and experience has proved, that state regulation of oil and gas production is essential to the orderly development of the industry and to conservation of these vital natural resources. There is nothing in the Natural Gas Act which provides any basis for imputing to the Congress the intention to bar effective state regulation, which would be the result if Appellant's position in this case were sustained.

It is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 62

NORTHERN NATURAL GAS COMPANY,
Appellant,

vs.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS.

APPEAL FROM THE SUPREME COURT OF KANSAS.

OBJECTION OF APPELLANT TO MOTION OF THE MID-CONTINENT OIL & GAS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Appellant, Northern Natural Gas Company, having heretofore refused its consent to Movant, hereby objects to the granting by this Court of the motion of The Mid-Continent Oil & Gas Association for leave to file brief *amicus curiae* in this appeal. In support of such objection appellant asserts to the Court that said motion discloses upon its face, and the briefs of the appellee, State Corporation Commission of the State of Kansas, heretofore filed herein, support the conclusion, that such motion does not

> "'* * * set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; * * *"

as required by Rule 42 (3) of this Court in that:

(1) Such motion concedes (p. 2) that appellee, State Corporation Commission of the State of Kansas, has "ably and correctly" argued in its briefs heretofore filed with the Clerk of this Court "in detail the specific issues of this case".

(2) The brief of Movant (leave to file which it requests) merely duplicates the position and arguments made and taken by appellee State Corporation Commission of the State of Kansas (Kansas Commission), even to the extent that it changes the "Question Presented" from that presented and argued by appellant Northern to that totally different Question asserted by appellee Kansas Commission. Movant's brief and motion constitute an obvious effort to impart to such position and legal arguments an aura of validity (for fear they are otherwise untenable) by asserting that they are supported by the wide membership of Movant association. Such assertion is not in accord with the fact, at least insofar as appellant, a member of Movant association, is concerned. There is no statement or allegation in said Motion or brief respecting the authority, if any, under which same are filed in this case. Even if such authority were set forth, the mere weight of numbers of those claimed to assert they agree with the Kansas Commission should not be persuasive nor permitted to obscure the real issue. Northern submits that the granting of this motion will serve only to burden the records of this Court in this appeal.

For the foregoing reasons, it is respectfully submitted that this Court should not grant the Motion of The Mid-Continent Oil & Gas Association for leave to file its said brief *amicus curiae*.

Respectfully submitted,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLANT'S REPLY BRIEF.

This brief responds to the brief of appellee, The State Corporation Commission of the State of Kansas, the supporting brief of *amici curiae* of the States of Texas, Alabama, Colorado, Georgia, Illinois, Louisiana, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Utah and Wyoming, as well as the supporting brief of the Mid-Continent Oil & Gas Association, to whose motion for leave to file brief *amicus curiae*, Appellant has hitherto objected.

Appellee and *amici curiae* in their respective briefs have, for the apparent purpose of avoiding the legal consequences of this Court's recent decisions construing the Natural Gas Act, attempted, without justifying authority, to reframe appellant's concisely stated question upon which this Court has noted probable jurisdiction. 370 U.S. 901 (Advance Sheet), 8 L. Ed. 399, 82 S. Ct. 1248.

This Court's decisions squarely hold that a state cannot regulate the sale and transportation of natural gas in interstate commerce for resale, because such sale and transportation are subject to the exclusive regulation of the Federal Power Commission under the provisions of the Natural Gas Act. But even if there were no Natural Gas Act, when the purchaser takes (purchases) for interstate transmission, such gas simultaneously "takes-off" in interstate commerce with no local incidences subject to state regulation. See *Michigan-Wisconsin* v. *Calvert*, 347 U.S. 157, 170, 98 L. Ed. 583, 74 S. Ct. 396. Of course, with the passage of the Natural Gas Act, Congress has fully occupied this field of regulation.

Appellee Misstates the Issue

As the question presented by appellant in its brief (p. 4) and in its jurisdictional statement (p. 7) clearly stated, the real issue is whether the Orders and Rule here under appeal, which on their face and in their operative effect regulate sales of gas in interstate commerce for resale, are valid in view of the Natural Gas Act and rules and regulations of the Federal Power Commission enacted pursuant thereto. The question is *not*, statements in appellee's briefs and those of *amici curiae* to the contrary notwithstanding, whether the State of Kansas or any state has the power to regulate *production* of natural gas. Appellant does not assert that the State of Kansas has no right under appro-

priate circumstances to restrict production of natural gas to prevent waste and to protect correlative rights. Under the Orders and Rule here on appeal, however, the Kansas Commission has made no attempt to restrict production for such legitimate purposes, but rather has promulgated Orders which regulate sales in interstate commerce and the intended operative effect of which was to force appellant to increase its purchases of gas from the Kansas part of the Hugoton Gas Field. Very briefly, the question raised by appellant and the Federal Power Commission (Rule 40(d)) in these appeals is whether the Kansas Commission can validly enter such Orders and Rule.

Appellee concedes, as it must, that its Order in Case No 42,128 in the Supreme Court of Kansas, is directed specifically against appellant, a natural gas company purchasing natural gas in the Kansas-Hugoton Gas Field for transportation and sale in interstate commerce for resale (Appellee's brief, p. 1), and that its Order and Rule in Case No. 42,127 in the Supreme Court of Kansas is directed against all purchasers of natural gas in each common source of supply in Kansas under proration, which necessarily includes all purchasers of natural gas in the Kansas-Hugoton Field, of which appellant is one. (Appellee's brief, p. 2).

Appellee Disregards Its Own Basic Proration Order in Effect Since 1944.

On page 4 of appellee's brief it is said:

> "At the time of the promulgation of the *orders involved in this case*, however, there was no *requirement* in any regulation of the Kansas Commission that the amount of gas produced or taken from any one well bear any relationship to that produced or taken from any other well in the same field." (Emphasis supplied).

The amazing fallacy of appellee's argument becomes clearly manifest when the Court examines the contents of appellee's "Basic Proration Order for the Hugoton Gas Field" (R. 49-66), particularly paragraph *j.* thereof (R. 58) where it is said:

> "The adoption of a formula that will enable each well to currently produce its allowable and ultimately produce approximately the amount of gas underlying the lease upon which it is located is the object sought to be accomplished by this order."

Also note paragraph *m.* thereof (R. 61-62) which reads:

> "That the production of gas in accordance with the above formula has a reasonable relation to prevention of waste, to the prevention of inequitable and unfair production of gas from the common source of supply, and to the prevention of unreasonable discrimination in favor of one producer in said field and against another producer therein *and that production of gas in such manner will in fact accomplish the purposes for which article 7, chapter 55, General Statutes of Kansas for 1935 was enacted.*" (Emphasis supplied) (See G.S., 1961 Supp., 55-703).

For the appellee here to assert that at the time of the promulgation of its purported "Ratable Take Orders" there was *no requirement* in any regulation of the Kansas Commission that *required ratable production by the producer*, or that such Orders and Rule were addressed to the purchasers because that is the *most feasible* method of assuring ratable production and protecting correlative rights (Appellee's brief, pp. 9-10) is clearly erroneous. If, as appellee and the Supreme Court of Kansas assert, the only objective of such orders was the protection of correlative rights and the securing of ratable production of natural gas in the Kansas-Hugoton Field, the Kansas Commission presumably had the authority to order Repub-

lic Natural Gas Company to restrict the production from its wells, under G.S., 1961 Supp., 55-703. As a matter of fact, appellee has in the past exercised such authority and ordered the wells of Republic shut-in for overproduction. See *Republic Natural Gas Co.* v. *State Corporation Commission*, (1952) 173 Kan. 172, 175, 244 P.2d 1196.

Kansas Commission's Objective Illegal.

The mandate of the statute G.S., 1961 Supp., 55-703, in effect at the time of the adoption of such purported "Ratable Take Orders," was to *limit the production of gas* for the purpose of conserving the same, preventing the waste thereof, and protecting the correlative rights of producers therein *in order to satisfy the market requirements* for gas from the common source of supply under appellee's jurisdiction. This is a legitimate state objective. This objective is clearly made manifest by the plain language of the statute itself, else the Legislature would not have stated in said statute, after reciting that whenever the Kansas Commission found and determined that its jurisdiction should be exercised thereunder,

> "* * * then any person, firm or corporation having the *right to produce natural gas therefrom, may produce only such portion of all of the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof.*" (Emphasis supplied).

However the appellee in promulgating its purported "Ratable Take Orders" has departed from such legitimate

state objective. The intended operative effect of the Orders and Rule upon the appellant's interstate operation in the Kansas-Hugoton Field is clearly pointed up in the *amicus curiae* memorandum for the Federal Power Commission. That memorandum definitely shows that these actions of the appellee exert leverage on interstate pipelines to purchase natural gas from one state rather than another.

On pages 25-30 of the Federal Power Commission memorandum, which portion thereof is made a part of this brief by reference to avoid duplication, the practical consequences of the purported "Ratable Take Orders" of the Kansas Commission here in question are accurately measured. Appellant is in full accord with this stated position of the Federal Power Commission as applied to the facts of this case, all of which is fully discussed in appellant's brief.

The operative effect of appellee's purported "Ratable Take Orders" becomes more pronounced and easier understood when it is considered that the "common source of supply of natural gas" dominant in the jurisdictional mind of appellee at the time of the issuance of its said Orders was the tri-state "*Hugoton Gas Field.*" When one examines carefully the respective briefs of appellee and those of its supporting *amici curiae*, it is often difficult to decipher in many places therein whether the reference is intended to the "Hugoton Gas Field" *in toto*, or only that part which is located in Kansas. The "Hugoton Gas Field" is a single inter-connected tri-state common source of supply, while the "Kansas-Hugoton Gas Field", as a common source of supply, is defined by Kansas law, G.S. 1949, 55-702, and appellee's Rule 82-2-201, as

> "* * * each geographic area or horizon, *or portion thereof lying within the state of Kansas*, which is definitely separated from any other such area or horizon and which contains, or from competent evidence ap-

> pears to contain, a common accumulation of gas." (Emphasis supplied).

In this connection appellee and the Supreme Court of Kansas prior to this case confined its jurisdiction, as it should, exclusively to that portion of the Hugoton Field lying within the boundaries of Kansas. In appellee's first price-fixing case, *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 724, 222 P.2d 704, the Supreme Court of Kansas said:

> "We are concerned here with *only* that part of the Hugoton gas field which is in Kansas." (Emphasis supplied).

When this Court examines the brief of *amici curiae* of the States of Texas *et al.* (p. 6), and that of the Mid-Continent Oil and Gas Association attached to its motion for leave to file brief *amicus curiae* (p. 6), it becomes crystal clear that such briefs construe the purpose of the purported "Ratable Take Orders and Rule" here in question, to include not only the protection of correlative rights of Kansas producers, but also to secure for them their "fair share" of the total market requirements of the respective pipeline companies purchasing gas from the entire tri-state "Hugoton Gas Field." The Supreme Court of Kansas, in its opinion denying rehearing in this case (R. 189), puts it in slightly different language by saying,

> "Thus, in 1958, the Commission may have been, in a roundabout way, endeavoring to set up *ratable taking as between Kansas wells and Oklahoma wells by increasing the allowables of the Kansas wells.*" (Emphasis supplied).

The Federal Power Commission (Brief, pp. 8-9) quotes freely from the concurring opinion of then Chairman Beatty of the Kansas Commission which clearly shows that the dedicated purpose of the Kansas Commission was to force

higher takes (purchases) of gas from the Kansas-Hugoton Field, in order that that field may receive what the Kansas Commission believes to be that field's "fair share" of the respective pipeline companies interstate markets. See also, appellant's brief, pp. 31-32, n. 6, for citation of reaffirmation of such policy by Commissioner (now Chairman) Byrd of the present Kansas Commission.

On pages 12 and 34-35 of appellee's brief it takes the position that the "motive" of the Kansas Commission in issuing its orders "to exert leverage on interstate pipeline companies, to increase their take from the Kansas wells" is irrelevant, and cites in support thereof the case of *Stephenson* v. *Binford*, 287 U.S. 251, 276, 77 L. Ed. 288, 53 S. Ct. 181, and other cases. Neither the *Stephenson* case nor the other cases cited by appellee deal with a factual situation where the Congress of the United States has entered and occupied the particular field of regulation attempted to be covered by Kansas in this case, i. e., the sale and transportation of natural gas in interstate commerce for resale and natural gas companies engaged in such sale and transportation. Exercise of a power within the realm of state interest is insulated from judicial review but such insulation is *not* "carried over" when that power is used to circumvent a federally protected right. See *Gomillion* v. *Lightfoot*, (1960) 364 U.S. 339, 347, 5 L. Ed. 2d 110, 117, 81 S. Ct. 125.

On page 27 of its brief, appellee takes the further position, citing purported authority of this Court therefor, to the effect that the Kansas orders are valid, even if it is assumed that compliance with the orders may require appellant rather than ultimate consumers to pay for gas not taken under the Republic "A" contract initially made in 1930. In making this statement appellee recognizes the unlawful operative effect of its Orders and Rule upon appel-

lant's interstate operations. Finally the position is taken, not only by appellee (p. 10 of its brief) but by supporting briefs as well (p. 16 Mid-Continent brief and pp. 14-15 Texas *et al.* brief), that if Kansas and other oil and gas producing states are to effectively regulate production, they must also have the authority to require purchasers of gas to take proportionately from all wells to which they may be connected in a common source of supply, even though the exercise of such authority by the states may *affect* sales of gas in interstate commerce for resale. Apparently the Supreme Court of Kansas too favors this position. *Northern Natural Gas Co.* v. *State Corporation Commission*, 188 Kan. 355, 359, 362 P.2d 599.

The short answer to these contentions may be found in the Supremacy Clause of the Federal Constitution, Article VI, Clause 2; in the decisions of this Court construing such Supremacy Clause and the provisions of the Natural Gas Act; and, in the admissions of the appellee in its brief.

Under Supremacy Clause Natural Gas Act Controls.

The Supremacy Clause of the Federal Constitution, as this Court well understands, in substance provides that when Congress by statute has entered and occupied a particular field, such as regulation of the sale and transportation of natural gas in interstate commerce for resale and natural gas companies engaged in such business, that law is supreme, and the regulating power of the State ceases to exist. *Erie R. Co.* v. *New York*, 233 U.S. 671, 681, 58 L. Ed. 1149, 34 S. Ct. 756. See also, *Free* v. *Bland*, 369 U.S. 663, 666 (Advance Sheet), 8 L. Ed. 2d 180, 183, 82 S. Ct. 1092, 1093.

With respect to the Natural Gas Act and the jurisdiction of the Federal Power Commission thereunder concern-

ing the sale and transportation of natural gas in interstate commerce for resale, this Court made it very plain in *Natural Gas Pipe Line Co.* v. *Panoma Corp.*, 349 U.S. 44, 45, 99 L. Ed. 866, 75 S. Ct. 576, that:

> "* * * such a sale and transportation cannot be *regulated* by a state but are subject to the *exclusive regulation* of the Federal Power Commission." (Emphasis supplied).

Again in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391, 2 L. Ed. 2d 355, 78 S. Ct. 381, and *Phillips Petroleum Co.* v. *Corporation Commission of the State of Oklahoma*, 355 U.S. 425, 2 L. Ed. 2d 412, 78 S. Ct. 409, 410, this Court reaffirmed its ruling that the regulation of such a sale and transportation as here involved are exclusively within the jurisdiction of the Federal Power Commission and a state is prohibited from regulating any aspect thereof.

Appellee Concedes Invalidity of Its Orders.

It is plain from the language used in appellee's brief (pp. 11-12) that it concedes the Federal Power Commission under the provisions of the Natural Gas Act "retains plenary authority to prevent, if it sees fit, the very consequences that are said to invalidate the Kansas orders." It points out that the Federal Power Commission also asserts authority to "modify or cancel take or pay provisions in proceedings under Section 5 of the Natural Gas Act, and to deal with such provisions in Section 4 or Section 7 proceedings." Appellee thus concedes, as it must, the manifest jurisdiction of the Federal Power Commission over the very function (sale) it seeks here to regulate. The sale of natural gas in interstate commerce for resale cannot be controlled by two masters where the jurisdiction of one is exclusive. Where Congress has entered the field of

such regulation, certainly the states cannot act with respect to any aspect thereof occupied by the Federal authority. In other words, the power of state regulation ceases to exist.

On page 10 of appellee's brief, it asserts:

> "The two Kansas orders do not conflict with or impair the authority of the Federal Power Commission *to fix prices* for gas sold in interstate commerce for resale, *to control the terms and conditions of such sales,* to grant certificates of convenience and necessity for the interstate transportation or sale of natural gas, *or to exercise any of the other powers conferred upon the Commission by the Natural Gas Act.*" (Emphasis supplied).

Since the purported "Ratable Take Orders" are directed to the sale rather than to production, the operative effect thereof intended under the circumstances here involved is to compel appellant to purchase and pay for more gas than is needed to supply its market from the Kansas Hugoton Field, with the consequence of increasing appellant's gas costs. (Compare Memorandum for Federal Power Commission, pp. 25-30.) That the Kansas Commission cannot directly fix the price for gas sold in interstate commerce for resale has already been definitely settled by this Court. What such Kansas Commission cannot do directly, it cannot do indirectly. For appellee to assert that these orders here in question do not conflict with or impair the authority of the Federal Power Commission, or control the terms and conditions of the sale of gas in interstate commerce for resale, or interfere with the exercise of other powers conferred upon the Federal Power Commission by the Natural Gas Act *controverts its own admissions as set forth above.*

Federal Regulation of Interstate Sales of Gas Exclusive.

Appellee attaches no significance to the words "regulate" or "exclusive regulation" as used by this Court in *Natural Gas Pipeline Co.* v. *Panoma Corp., supra,* and as defined by this Court long ago in *Dayton-Goose Creek R. Co.* v. *United States,* 263 U.S. 456, 478, 68 L. Ed. 388, 398, 44 S. Ct. 169. (See appellant's jurisdictional statement, pp. 19-20 for quote defining the word "regulate"). See also *North American Co.* v. *Securities & Exch. Com.,* 327 U.S. 686, 704, 90 L. Ed. 945, 66 S. Ct. 784, where it is said:

> "For nearly one hundred and twenty-five years, this Court has recognized that the power of Congress over interstate commerce is 'the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' Gibbons v. Ogden, supra (9 Wheat. (U.S.) 196, 6 L. Ed. 70)."

It is clearly untenable in the face of these authorities for appellee to contend that this Court's decisions construing the Natural Gas Act *limit the jurisdiction* of the Federal Power Commission *merely to the regulation of the price of natural gas sold in interstate commerce for resale.* Certainly such a view does not conform either to the intent of Congress or the plain language used by this Court in its decisions.

For this Court to hold that the State of Kansas by these purported "Ratable Take Orders" *can affect even to a limited extent the jurisdiction of the Federal Power Commission to regulate the sale and transportation of natural gas in interstate commerce for resale in this tri-state gas field, would open the door for Oklahoma and Texas as well as every other gas producing state to attempt to do*

likewise. The so-called "incidental" effect upon federal jurisdiction (particularly when such federal jurisdiction is exclusive) *would then be compounded and the competitive race between the states* (under the guise of regulating production) *would be in full swing—analogous to the competitive race between Oklahoma and Kansas, nullified by this Court, when such states attempted successively to "jack up" the price of natural gas flowing uninterruptedly from this same common source of supply to the interstate markets of the respective pipeline companies.*[1]

In commenting on the position taken in the memorandum filed herein for the Federal Power Commission that the judgments herein should be vacated and these appeals remanded to the Supreme Court of Kansas for determination by that court as to whether the Orders and Rule here under appeal acted so as to remove from the Republic "A" contract the minimum take obligations therein contained, appellant would observe that if this Court should be of the view that the validity of the Kansas Orders and Rule depends thereon, then appellant concurs in the position of the Federal Power Commission that the judgments appealed from be vacated and the case remanded to the Supreme Court of Kansas for determination of that Court in this case of that specific question.

As clearly heretofore pointed out in this brief such Orders and Rule regulating the taking of gas (purchase and transportation for resale in interstate commerce) is a matter *exclusively* under the control of the Federal Power Commission under the provisions of the Natural Gas Act.

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1. Compare *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229, 55 L. Ed. 716, 31 S. Ct. 564; *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 67 L. Ed. 1117, 43 S. Ct. 658; *Michigan-Wisconsin P. L. Co.* v. *Calvert*, 347 U.S. 157, 170, 98 L. Ed. 583, 593-594, 74 S. Ct. 396.

Appellant, therefore, submits that the importance of the real question here presented is so much in the public interest and of concern to the industry and the states, that it requires an immediate solution by this Court.

CONCLUSION.

Based upon the record before this Court and the arguments and authorities cited in appellant's briefs, supplemented by the Federal Power Commission's memoranda, it is asserted by appellant that in this interstate common source of supply of natural gas (the Hugoton Gas Field) the Kansas Commission by its purported "Ratable Take Orders and Rule" has unlawfully attempted to extrapolate its authority and jurisdiction to regulate the sale and transportation of natural gas in interstate commerce for resale and to natural gas companies engaged in such sale and transportation, all of which matters are within the *exclusive* jurisdiction of the Federal Power Commission, and by reason thereof the respective judgments of the Supreme Court of Kansas sustaining such Orders and Rule should be reversed.

Respectfully submitted,

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